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OF THE SEVERAL STATES.

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BY A. C. FREEMAN.

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PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa.

St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa. St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**; (203, 204 Pa. St.) **93**; (205 Pa. St.) **97**; (206 Pa. St.) **98**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**; (24) **96**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **56**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **76**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**; (65) **95**; (66) **97**.

SOUTH DAKOTA. — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**; (109) **97**.

TEXAS. — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**; (95) **93**; (41, 42, 43 Tex. Cr. Rep.) **96**; (96) **97**.

UTAH. — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**; (25) **95**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**; (74) **93**; (75) **98**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**; (100) **93**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**; (30) **94**; (31) **96**; (32) **98**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**; (52) **94**; (53) **97**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**; (115) **95**; (116) **96**; (117) **98**.

WYOMING. — (3) **31**; (4) **63**; (5) **68**; (6) **71**; (7) **75**; (8) **80**; (9) **87**; (10) **98**.

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(25)

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

HURLBURT v. ARTHUR.

[140 Cal. 103, 73 Pac. 734.]

CORPORATIONS—Stockholder's Liability—When Enforceable Against a Pledgee.—One who, upon the books of a corporation, appears as a stockholder cannot escape liability by showing that he holds the stock as collateral security for the payment of a debt, if the statutes of the state provide for the keeping of a book by the corporation containing a list of stockholders, and that the entries on such book shall be conclusive evidence against directors and stockholders of the number of shares held by each. (p. 23.)

William A. Bowden, for the appellant.

J. R. Welch, for the respondents.

104 LORIGAN, J. The plaintiffs, as depositors of the Union Savings Bank of San Jose, bring this action against the defendant Miller for his proportionate liability, as a stockholder thereof, under section 322 of the Civil Code.

The case was tried in the lower court on an agreed statement of facts, from which, as far as it is pertinent to this appeal, it appears that the said bank, prior to 1896, and continuously up to January 30, 1899, was a corporation, organized under the laws of this state, and engaged in the business of banking in the city of San Jose, Santa Clara county, with a capital stock of one million dollars, divided into ten thousand shares, all of which were, at least three years prior to said January 30, 1899, subscribed for, issued and outstanding. That on said January 30, 1899, said bank became insolvent. That between April 19, 1897, and January 3, 1899, a large num-

ber of persons deposited in said bank sums aggregating one hundred and forty-three thousand four hundred and eighty-one dollars and thirty-five cents which have never been repaid, and their claims for which were, prior to the commencement of this suit, properly assigned to the plaintiffs; that said bank kept a book, known as the stock transfer-book, in which it kept a record of all stock, the names of the stockholders, a statement of every transfer of stock, the date thereof, and by and to whom made, and such other books and records provided for by law, and the by-laws of said bank. That said books show that there was issued to the defendant Henry [105] Miller, in his individual name, on April 19, 1897, a certificate for seventy shares of the capital stock of said bank; that said seventy shares of stock were previously held by one George T. Dunlap, who on that day transferred them to said Miller; that said transfer of said stock was regularly entered in the transfer-book and upon the stock ledger of said bank. That while said Miller so held said certificate of stock in his individual name, as shown by the books of the bank, which were accessible to all stockholders, depositors, and creditors, he held the same in fact as collateral security for the payment of a debt due him from said Dunlap; that there is nothing on the books or records of said bank to show that Miller was holding it as collateral security, and that the plaintiffs did not know prior to the answer of Miller filed in this action that he so held it.

Judgment was entered in favor of plaintiffs against defendant Miller, and he appeals.

The only question presented on this appeal is, whether in this state one who, upon the books of a banking corporation, appears as a stockholder, may show, to escape his statutory liability to its creditors—depositors in this instance—that he was not in fact the owner of the stock, but held it merely as collateral security. The solution of this question will depend upon the construction to be given certain sections of the Civil Code bearing upon the subject. Section 321 thereof with reference to stockholders in a banking corporation reads: "Every corporation doing a banking business in this state must keep in its office, in a place accessible to the stockholders, depositors, and creditors thereof, and for their use, a book, containing a list of all stockholders in such corporation, and the number of shares of stock held by each. . . . . The entries on such book . . . . shall be conclusive evidence against each director and stockholder of the number of shares

held by each." The other section (Civ. Code, sec. 322) is found in the general law governing corporations, and, in as far as it is applicable to the matter under consideration, provides: "The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock. The term 108 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock. . . . . Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability."

It will readily suggest itself that the only difficulty in this case lies in construing and applying the phrase "except in the cases mentioned," found in that part of the section exempting those holding stock as collateral security, or in representative capacities, from the general liability of stockholders.

Appellant contends that these excepted cases are to be found in the previous portion of the section defining the term "stockholder," and apply only to equitable owners, and persons advancing the purchase price for minors, and to guardians, or trustees voluntarily investing trust funds, who, in terms, are there declared to be stockholders and liable as such.

It is only natural that appellant should make this contention, because if the only other case in which that section defines a stockholder and declares his liability—viz., where he appears on the books of the corporation as such—is embraced in the exception, it is the end of appellant's claim of immunity. This exigency, however, affords no reason why such limited construction should prevail. On the contrary, as the contention is a concession that the "excepted cases" apply to all but one class of persons, which the section itself defines as stockholders, it is a persuasive reason why, as these latter

persons are also embraced in the definition, they should also come within the exception. It will be observed that the first part of the section itself defines who are "stockholders" and liable as such, and declares them to be those who appear [107] on the books of the corporation as such; also equitable owners, investors for minors and guardians, and trustees voluntarily investing trust funds. In all such cases, the law itself stamps them as stockholders, leaving no room for question as to their relation to the corporation or as to their liability to creditors. It then declares, that holders of stock as collateral security, and in representative capacities, are not liable as stockholders "except in the cases above mentioned," which are obviously the cases where, as indicated, the law has in terms declared them to be such.

This is not only the natural construction to be put on this section, but it was doubtless the intention of the legislature to make persons liable, as stockholders, whenever they appeared to be such on the face of the corporation books. Motives of public policy would suggest such legislation, and the fundamental idea inspiring it would be to afford the greatest protection to creditors of a corporation, and to the highest extent secure them against loss. A creditor dealing with a corporation can have no assurance of its financial responsibility except such as he gathers from the examination of the stock register to ascertain who its stockholders are, and the legislature intended, as this was the only practical way in which the creditor could obtain information, to make the stockholder responsible to him to the extent and in the capacity his relation to the corporation appeared from the inspection of its books. It was a very easy matter for the appellant in this case, as it is equally so for persons holding stock as collateral security in any case, to have the record of the corporation show his exact relation to the stock upon the corporate books. And as far as the validity of a pledge of stock is concerned, that would legally exist independent of any transfer upon the books of the corporation from the pledgor to the pledgee: Spreckels v. Nevada Bank, 113 Cal. 277, 54 Am. St. Rep. 348, 45 Pac. 329. As the pledgee might show what the real transaction was upon the books of the corporation, the law has fixed as a penalty for his failure to do so a responsibility to the same extent that would follow had he in fact been the owner of the stock, and appearing as such upon the stock register. And we can understand how the necessity for show-

ing the true relation [108] in which stock of a corporation is held would be particularly applicable in cases of bank depositors, where the principal, if not the only, reliance a depositor may have for the return of his money, is upon the financial responsibility of its stockholders, and he can only ascertain that responsibility by an inspection of the list of the stockholders, as disclosed by the books of the bank. If, as contended by appellant, one who appears upon the books of the bank as a stockholder is not within the exception in the section, but may relieve himself of all responsibility to depositors by showing that he holds the stock as pledgee, we would have this condition, that while upon the face of the books the stockholders would consist of persons financially able to meet any possible claims, yet in truth they would be but nominally so, and in reality represent undisclosed, embarrassed stockholders, from whom the depositor would be compelled hopelessly to look for payment, although he became a depositor solely upon the responsibility of the stockholders as exhibited by the books. It is no answer to say that this same condition of things might exist if the books showed that these apparent stockholders were in reality pledgees of the stock. The vital difference is, that in the first instance the depositor is misled by an apparent financial responsibility; in the second, he is aware of the true condition of things and can govern himself accordingly.

The reason for this rule of liability is aptly stated by the court in Magruder v. Colston, 44 Md. 356, 22 Am. Rep. 47, speaking of an undisclosed pledgee on the corporate books: "The reason for this is obvious. The stock stands on the books of the bank in his name, and he is thus held out to the public as a shareholder, and persons dealing with the bank have no means of knowing the nature of the contract under which he holds the stock, and have a right to presume, and are led to believe, that he is the absolute owner of it, and it is but fair to presume that they deal with the bank upon the faith and credit of parties thus appearing as stockholders. Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liability incident to that relation by transferring the stock. Until this is done they continue to be stockholders within [109] the meaning of the banking act. If we depart from the terms of the law, and inquire into the equities which may exist between the stockholders and third persons, it cannot fail to embarrass creditors in seeking a remedy for the

wrongs which have been done by the corporation. If creditors must look beyond the legal title as exhibited by the books of the bank they can never know against whom to proceed."

As to the construction which is to be placed upon these sections of the code, we are aided in a very large measure by the construction which the supreme court of the United States has placed upon almost identical sections in the national banking act. Section 5210 of the Revised Statutes provides that national banks shall "keep at all times a full and correct list of the names and residences of all stockholders in the association and the number of shares held by each, in the office where its business is to be transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association." By section 5152 thereof it is provided that: "Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liability as stockholders." It will be thus observed that the recited sections are in the main very similar to our own, and the supreme court in construing them has uniformly held that the books of the bank are conclusive in actions brought by creditors as to who are stockholders thereof. In Pauly v. State L. etc. Co., 165 U. S. 621, 17 Sup. Ct. Rep. 465, it is said: "Manifestly one, if not the principal, object of this requirement [listing] was to give the creditors of the association, as well as other authorities, information as to the stockholders upon whom, if the association became insolvent, will rest the individual liability of its contracts, debts, and engagements. It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books as a true owner, may be treated as the owner. . . . . If as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value." In Anderson v. Philadelphia Warehouse Co., 111 U. S. 483, 4 Sup. Ct. Rep. 525, it is said: "It is well settled that one who allows [110] himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or pledgee only": Germania Nat. Bank v. Case, 99 U. S. 628.

And the general rule upon this subject is, that in the absence of an express statute to the contrary, the liability to pay calls and to respond to creditors in the event of insolvency of

the corporation attaches to the holder of the legal title to the stock, and the courts will not look beyond the registered shareholder, nor inquire under what equity he holds, and so one who takes stock as collateral security and has it transferred to himself and so registered on the books of the company, will be liable to the creditors: Cook on Stock and Stockholders, secs. 247, 253; 3 Thompson on Corporations, secs. 3192, 3194, 3213; Roosevelt v. Brown, 11 N. Y. 156; Davis v. Essex Baptist Soc., 44 Conn. 585; Sherwood v. Illinois etc. Sav. Bank, 195 Ill. 118, 88 Am. St. Rep. 183, 62 N. E. 835; Holyoke Bank v. Burnham, 11 Cush. 183; Pullman v. Upton, 96 U. S. 330; Wheelock v. Kost, 77 Ill. 296. Some of these cases cited have reference to claims of nonliability by persons who were in fact trustees, although they did not so appear upon the books of the company. They were, nevertheless, held liable, and the same reasoning which would apply in such cases is equally applicable to persons claiming exemption from liability as pledgees under our section of the code, because any immunity from liability which is there given to trustees is equally extended to pledgees; they both stand upon the same legal plane in this respect.

We are satisfied from these authorities that while the holder of stock as collateral security is entitled to an exemption from liability as to the creditors of the corporation, that exemption can only be availed of where it appears upon the face of the books of the corporation that he holds such stock in pledge; but that where, from the books of the corporation he appears to be a stockholder, and there is nothing to indicate that he holds the stock as pledgee, or in any other capacity than as owner thereof, he will be held liable to creditors from the position he thus assumes upon the books, and will not be permitted to show that he is in fact simply a pledgee of the stock. As to him the books of the corporation are conclusive: Baines v. Babcock, 95 Cal. 593, 29 Am. St. Rep. 158, 27 Pac. 647, 30 Pac. 776.

[111] The appellant has cited us to three authorities from three different states—Maryland, Missouri and New York—and a decision from the supreme court of the United States, in which these various state decisions are cited. In none of those states was there any section of the code similar to ours in its definition of a stockholder and the extent of his liability; nor upon their examination do they seem to be well-considered cases. In one of them—Matthews v. Abbott, 24 Md. 527—the

statement that a person appearing upon the books of a corporation as a stockholder, may show that he held the stock simply as collateral security, is the mere arbitrary declaration of a conclusion. No authorities are cited to sustain it, and no reasons are given showing why it is reached. Main reliance, however, is placed upon the decision from the supreme court of the United States (Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. Rep. 10) in which, as above said, the state authorities are referred to. In this latter case, however, the defendant held stock directly from the corporation. He held it in trust as security for money advanced, and the stock transfer-book of the company showed that the stock was "held in escrow" by him. The court held that the plaintiff had actual notice and knowledge of the manner in which defendant held the stock; that he had derived a benefit from the transaction between the corporation and Seligman, and further found that if the stock had not been issued to the defendant it would have remained in the treasury of the corporation, and hence the plaintiff would have been no better or worse off. The peculiar conditions surrounding that case seem to have actuated the decision of the court in behalf of the defendant. It certainly does not present the same case as where a party appears upon the books of the corporation, absolutely as a stockholder, and endeavors to defeat that situation as against a creditor who is not advised that he held any other relation to the corporation than such as the corporate books disclosed.

We are satisfied that from the authorities and for the reasons suggested, the judgment of the lower court was right, and it is affirmed.

McFarland, J., and Beatty, C. J., concurred.

A Creditor of an Insolvent Corporation is ordinarily entitled to hold him liable as a stockholder who appears to be such on the corporate books: Sherwood v. Illinois etc. Sav. Bank, 195 Ill. 112, 62 N. E. 835, 88 Am. St. Rep. 183, and cases cited in the cross-reference note thereto.

STOCKWELL v. MUTUAL LIFE INSURANCE COMPANY.

[140 Cal. 198, 73 Pac. 833.]

INSURANCE, LIFE—Right of Beneficiary to Pay Premiums to Keep Alive.—If a policy of insurance issues on the life of A payable to his wife, but in case of her death, to her surviving children, one of the latter, on the death of the mother, has the right to pay the premiums thereafter accruing, and thus keep the policy alive. (p. 27.)

INSURANCE, LIFE—Premiums Necessary to be Paid by One of Several Beneficiaries.—Where there are several beneficiaries of a policy insuring a life, one cannot, by paying his share of the premium keep the policy alive, but must pay the entire premium as it accrues, or forfeit all his interest. (p. 27.)

INSURANCE, LIFE—Liability of One of Several Beneficiaries for Premiums Paid by Another.—If one of several beneficiaries pays all the premiums accruing on a life insurance policy to prevent its forfeiture, he cannot then maintain an action against the others for their share, but whenever any of them asserts a right to share in the proceeds of the policy, he becomes liable to contribute his share of the moneys so paid and accruing for his benefit. (pp. 27, 28.)

INSURANCE, LIFE Lien upon Proceeds of in Favor of One Paying Premiums.—When a person, not being the owner of a policy of insurance, nor bound to pay the premium, but having some interest, or color of interest, in it, voluntarily pays the premiums thereon, and thus keeps it alive for the benefit of a third party, he is entitled to a lien on the proceeds of the policy to secure the repayment of the advances. (p. 28.)

PLEADING—Nonpayment, When Need not be Alleged.—In an action to compel one of several beneficiaries to contribute his share of moneys to pay premiums to keep a policy of insurance alive, the failure to allege nonpayment is not fatal, because the suit is not upon a contract for the payment of money. (p. 29.)

LIMITATIONS, STATUTE OF.—In an Action to Compel Contribution by one of several beneficiaries under a policy of life insurance for advancements to keep the policy alive, a cause of action does not accrue when the advancements are made, nor at any time prior to the death of the person on whose life the policy issued. (p. 29.)

HUSBAND AND WIFE—Right of Married Woman to Recover for Advances Made by Her Husband at Her Request.—If a married woman is one of several beneficiaries under a policy of insurance on the life of another, and the premiums necessary to keep the policy from forfeiture are paid by her husband at her instance and request, and for and on her account, and for her benefit and behoof, she may maintain an action against other beneficiaries to compel them, on their claiming the benefit of the policy, to pay their share of such advances. (p. 30.)

PRACTICE—Right to Examine Papers Offered for Identification.—If writings are shown to a witness and identified as being in the handwriting of a party to the action, and marked for identification, such party has no right to examine such writings unless they are offered in evidence. (p. 30.)

EVIDENCE—Burden of Proof of the Reimbursement of the Plaintiff.—In an action by one beneficiary under a life insurance policy against another to compel contribution for advances made by plaintiff to keep a policy on the life of their father alive, in which it is claimed that the plaintiff has been reimbursed by the father for the advances so made, the burden of proof is on the defendant. (pp. 30, 31.)

C. M. Stephens and Kendrick & Knott, for the appellant.

W. H. Morris and Marble & Phibbs, for the respondent.

199 HAYNES, C. On October 13, 1866, Sarah L. Yoemans obtained a policy from the Mutual Life Insurance Company 200 of New York, in the sum of five thousand dollars, upon the life of her husband, Thomas D. Yoemans, payable to herself, or, in case of her death, to her surviving children. She died August 28, 1892, her said husband and five children surviving her. Her husband, upon whose life the policy was issued, died February 21, 1900, said five children surviving him.

In 1881 said Sarah L. Yoemans became unable to pay the premiums upon said policy, and from April, 1881, to April, 1891, her daughter, the plaintiff Alice L., then unmarried, paid the premiums on said policy, amounting to five hundred and twenty-five dollars, and from the time of her death, until the death of said Thomas D. Yoemans, L. W. Stockwell, the husband of the plaintiff, paid all the premiums accruing upon said policy, amounting to eight hundred and seventy-nine dollars and sixty-seven cents, out of community funds at her request.

The defendant insurance company was ready and willing to pay, but appellant, one of the beneficiaries, refused to have her one-fifth of the amount of the policy charged with its proportion of the said premiums paid by and for the plaintiff, and without which the policy would have lapsed.

This action was thereupon brought and the insurance company paid the full sum due on the policy into court. The other three beneficiaries assigned their interest in the fund to the plaintiff, and upon the hearing plaintiff's contention was sustained, and defendant Marian A. Whissen appeals from the judgment and from an order denying her motion for a new trial.

Appellant demurred to the complaint upon the ground of insufficient facts, and upon the further ground that each of the payments charged, down to and including the premium paid July 13, 1898, is barred by the first subdivision of sec-

tion 339 of the Code of Civil Procedure. The demurrer was overruled on both grounds, and defendant answered.

Upon the trial the court eliminated from the case all moneys paid by the plaintiff prior to the death of Mrs. Yoemans, amounting to five hundred and twenty-five dollars, holding that those payments were made at her request, and were in the nature of loans to the policy-holder, and no question is made upon that ruling.

Appellant contends that the complaint is insufficient for the reason that the payments were voluntary; that in making them the plaintiff did not act as agent, nor in pursuance of [201] any agreement with the defendant, and that the children of the assured were not bound by the policy to pay the premium. It is contended that "a suit for contribution will not lie unless the payment for the benefit of all was made pursuant to an obligation; that no man can be made a debtor for money paid to his use, unless it is done at his request, or unless the party paying was bound to pay it for him."

Neither appellant nor the insurance company questioned the right of respondent, who was a beneficiary under the policy, to pay the premiums accruing after her mother's death, and thus keeping the policy alive for her own benefit; and this doctrine is applicable where the designated beneficiaries are the "children," or "legal heirs," of the person effecting the insurance: Yore v. Booth, 110 Cal. 238, 241, 52 Am. St. Rep. 81, 42 Pac. 808.

It is quite true that there was no legal liability resting upon any of the beneficiaries to pay the premiums accruing upon the policy, and that the payments made by respondent were in that sense voluntary. But it was not in the power of respondent to sever her interest in the policy from that of the other children of the assured, and keep alive the policy for her own benefit by paying one-fifth of the premiums as they became due. She was compelled to pay the entire premium as it accrued, or forfeit all interest under it. She could not protect her own interest in the policy without at the same time, and by the same expenditure, protecting the interest of all the beneficiaries who should see proper to avail themselves of her expenditure by sharing in the proceeds of the policy. Respondent had no legal claim against appellant. She could not maintain an action against her to recover the one-fifth of the amount she had paid to preserve the policy in force.

It was optional with appellant whether she should share in the benefits of the policy at the expense of her share of the premiums or renounce all claims of interest in the policy. But the moment appellant asserted a right to share in the proceeds of the policy she admitted her equitable liability to share in the expenditure by the respondent, without which there would have been no fund to distribute. If respondent had no interest in the policy, or if she could have severed her interest and protected it by paying her proportion of the [203] premiums as they accrued, all payments made beyond such proportion would have been strictly voluntary. There is a class of equitable rights and liabilities which at law are referred to the fiction of "implied contracts," but which arise wholly from considerations of right and justice which lie at the foundation of equity jurisprudence, and which really exist ex aequo et bono. The relation of these beneficiaries to each other in reference to the policy of insurance after the death of their mother was analogous to that of tenants in common in a parcel of real estate. It would not be questioned that one of them might make such reasonable repairs to the building as were necessary for its preservation, and charge the expense thereof upon the property to be equally borne by the tenants in common. This right does not depend upon contract, but an equitable lien is created upon the property as security for its repayment. Pomeroy, in treating of liens arising ex aequo et bono, says: "Where a person, not being the owner of a policy of life insurance, nor bound to pay the premium, but having some claim or color of interest in it, voluntarily pays the premiums thereon, and thus keeps it alive for the benefit of a third party, he may thereby acquire an equitable lien on the proceeds of the policy as security for the repayment of his advances": 3 Pomeroy's Equity Jurisprudence, sec. 1243.

In Scobey v. Waters, 10 Lea (Tenn.), 552, several beneficiaries joined in an assignment of a policy upon the life of their father to a creditor. One of the children was a minor. The insured died. The assignment by the minor was held to be void, "but that her one-fifth of the fund should be charged with one-fifth of the premiums paid by the assignees with interest."

In Brick v. Campbell, 122 N. Y. 338, 25 N. E. 493, a married woman, the beneficiary of a policy on the life of her husband, made an unauthorized assignment of it to a creditor of her husband. In an action to compel the reassignment of the policy a new trial was granted, the court saying that if defend-

ant had paid any premiums upon the policy they should be repaid, with interest.

The English cases are in harmony with the foregoing: See Norris v. Caledonian Ins. Co., L. R. 8 Eq. 127; Gill v. Dowing, L. R. 17 Eq. 316; Todd v. Morehouse, L. R. 19 Eq. 69. The law of contribution, referred to by appellant, applies [203] where one of several codebtors or cosureties is compelled to discharge an obligation, and the other codebtors or cosureties are required to contribute toward his reimbursement. In such case the contribution is compulsory; here it is optional. Appellant may share in the fund if she chooses to do so, but upon condition that she contributes to the reimbursement of the plaintiff who alone preserved the fund. The only case cited by appellant that sustains her contention is Meier v. Meier, 15 Mo. App. 68. The argument in that case, however, is in the main confused and inconclusive, though in one part of the opinion the principle leading to an opposite conclusion is clearly stated. It is there said: "There is a policy of the law which, in the absence of any statute upon the subject, will raise an implied promise to repay the necessary expense reasonably incurred in saving valuable property to the owner. But in those cases the owner is to be the judge as to whether he will take the property with the burden or abandon it to the possessor, so that the acceptance of the property is a ratification of the act of the salvor."

What has been said is a sufficient reply to appellant's contention that "in a suit upon a contract for money a failure to allege nonpayment is fatal." The suit is not upon a contract for the payment of money. Appellant demanded the payment of one thousand dollars. Respondent offered to pay that sum, less appellant's proportion of the premiums paid by her. The entire fund was in the hands of the court for distribution according to the rights of the parties thereto.

The statute of limitations was pleaded by appellant, both by demurrer and answer. It is a sufficient reply to this contention of appellant to say that no right or cause of action accrued to respondent against appellant on account of the payment of the premiums until the death of Yoemans, upon whose life the policy was issued, which occurred February 21, 1900, and this suit was commenced September 4th of the same year.

Appellant further contends that she is entitled to judgment on the findings, for "there is no finding that plaintiff paid any part of the premiums." The finding is, that the plain-

tiff's husband from his own earnings paid the several premiums out of his earnings for the purpose of saving the policy [204] from lapsing, "and that said payments were so made by him at the instance and request and for and on account and to the benefit and behoof of his wife, the plaintiff herein," and that nothing was paid by any of the other beneficiaries. This finding is quite sufficient.

It is also contended by appellant that the court erred in admitting in evidence certain notes and memoranda of payments made upon the premiums, said notes and memoranda having been made by Thomas D. Yoemans, upon whose life the policy was issued. He had no interest in the policy, and it may be conceded, for the purposes of this opinion, that the evidence was not material, and could properly have been excluded; but it is equally clear that it was not prejudicial or injurious to appellant, as the payments referred to were those made before the death of plaintiff's mother, and were not allowed by the court.

When plaintiff was being examined as a witness certain writings were shown to her, and were identified as being in appellant's handwriting, and were marked for identification by the reporter. Appellant's counsel asked that he be permitted to inspect them. The court ruled that defendant had no right to do so until they were offered in evidence. These papers were not read or offered in evidence. In support of her contention appellant quotes part of section 2054 of the Code of Civil Procedure, but omits the last clause. Said section reads: "Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read *except on recalling the witness.*" The words we have italicized preserve to the opposite party the right to examine the witness concerning the writing before it is read in evidence. The mere identification of the writing, and having it marked by the reporter, if it is not afterward offered or read in evidence, cannot prejudice the opposite party, since it cannot be read to the jury without recalling the witness for cross-examination.

It is also said by appellant that there was no finding as to whether or not plaintiff was "reimbursed" by her father for the payments made by her.

The policy was upon the life of her father, and therefore he [205] had no interest in the policy. It was pleaded by defend-

ant as an affirmative defense, and the burden of proof was upon her, and there was no evidence tending to sustain the allegation. True, it was shown that after plaintiff's marriage her father received some money from an estate in England and with it bought a lot and paid therefor eighteen hundred dollars, and had it conveyed to plaintiff. The evidence tended to show that it was a gift to his daughter, the plaintiff, with whom he lived. The third finding, we think, covers the issue in question. It was found: "That neither the defendant, Marian A. Whissen, or any of the other beneficiaries, or anyone on their behalf, have ever paid any of the said premiums, nor have they nor either of them, nor anyone on their behalf, ever reimbursed the said plaintiff or said L. W. Stockwell for or on account of any of the payments by the latter made as aforesaid."

The findings referred to by appellant are not inconsistent. The payment of the premiums, it is found, was made for the purpose "of saving to the plaintiff as well as the other beneficiaries the benefits and amounts by said policy secured, and that said premiums were so paid by him at the instance and request and for the benefit of his wife."

The evidence is quite sufficient to sustain the findings, and the judgment and order appealed from should be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Shaw, J., Angellotti, J., Van Dyke, J.

ACTIONS FOR CONTRIBUTION NOT FOUNDED ON AN EXPRESS PROMISE.*

I. Scope of Note.
II. Foundation of the Right.
III. Common Charges or Encumbrances on Land.
IV. Principal Debtors and Co-contractors.
V. Assignment of the Right to Contribution.
VI. Presumptions as to the Liability of Co-obligors.
VII. Agreements to Support Third Persons.

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*REFERENCES TO MONOGRAPHIC NOTES.

Contribution among joint principals, one being insolvent: 20 Am. Dec. 559.
Contribution among sureties, and remedies to enforce it: 10 Am. St. Rep. 639.
Contribution between different sets of sureties: 70 Am. St. Rep. 444.
Contribution between parties jointly liable for negligence: 16 Am. St. Rep. 258.
Contribution between stockholders for corporate debts: 3 Am. St. Rep. 870.
Contribution for costs of party-walls: 89 Am. St. Rep. 941.

VIII. Judgment Debtors.
a. In General.
b. Statutory Modifications.
c. Costs of Litigation.
IX. Sureties.
X. Effect of the Discharge of One Joint Debtor.
XI. Miscellaneous Instances of Contribution.
XII. The Statute of Limitations.
a. When It Starts to Run.
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XIII. Measure of Contribution.
a. In General.
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XIV. Enforcement of the Right.
a. Plaintiff must Pay More than His Proportionate Share.
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XV. Jurisdiction of Courts of Law and Equity.
XVI. Parties.
XVII. Pleading and Evidence.
XVIII. Notice of Satisfaction and Demand Unnecessary.

I. Scope of Note.

It is the purpose of this note to discuss only the general rules relating to the doctrine of contribution. The various phases thereof, such as contribution between cosureties, corporate stockholders, joint tort-feasors, and the like, will not be separately dwelt on, they having been annotated in this series from time to time.

II. Foundation of the Right.

Contribution is defined as a payment made by each, or by any, of several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others. If one pays more than he should, he may compel his codebtor to contribute his share of the money paid: Township of Canosia v. Township of Grand Lake, 80 Minn. 357, 83 N. W. 346.

It is universally conceded that this doctrine is not founded on contract, but on an acknowledged principle of equity, which requires that those who voluntarily assume a common burden should bear it in equal proportions: White v. Banks, 21 Ala. 705, 56 Am. Dec. 283; Owen v. McGehee, 61 Ala. 440; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180; Taylor v. Reynolds, 53 Cal. 686; Craig v. Ankeney, 4 Gill (Md.), 225; Mason v. Lord, 37 Mass. (20 Pick.) 447; Van Petten v. Richardson, 68 Mo. 379; Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Paulin v. Kraighn, 27 N. J. L. 503; Aspinwall v. Sacchi, 57 N. Y. 331; Campbell v. Mesier, 4 Johns. Ch. 335, 8 Am. Dec. 570; Boyer v. Marshall, 8 N. Y. St. Rep.

233; Moore v. Moore, 11 N. C. (4 Hawks) 358, 15 Am. Dec. 523; Allen v. Wood, 38 N. C. (3 Ired. Eq.) 386; Russel v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Hartwell v. Smith, 15 Ohio St. 200; Oldham v. Broom, 28 Ohio St. 41; Robinson v. Boyd, 60 Ohio St. 57, 53 N. E. 494; Durbin v. Kuney, 19 Or. 71, 23 Pac. 661; In re Kalbach, 2 Woodw. Dec. (Pa.) 415; Armstrong County v. Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368; Harris v. Ferguson, 2 Bail. (S. C.) 397; McKenna v. George, 2 Rich. Eq. (S. C.) 15; Screven v. Joyner, 1 Hill Eq. (S. C.) 252, 26 Am. Dec. 199; Glasscock v. Hamilton, 62 Tex. 143; Swain v. Barber, 29 Vt. 292; Miller v. Sawyer, 30 Vt. 412:

Now a contract is implied from the universality of the principle, the law, by this implication, thus affording a remedy: Drummond v. Yager, 10 Ill. App. 380; Norton v. Coons, 6 N. Y. 33; Tobias v. Rogers, 13 N. Y. 59. In Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76, it is said that the right of one surety to call on his co-surety for contribution arises from a principle of equity growing out of the relation which the parties have assumed toward each other; that the equity springs up at the time of entering into that relation, and is fully consummated when the surety is compelled to pay the debt: See, also, Norris v. Churchill, 20 Ind. App. 668, 51 N. E. 104.

Whether the right of contribution is based on principles of equity or on an implied contract, it was held in Bentinck v. Bentinck, 80 Law Rep., N. S., 71, that the intention of the contracting parties was the determining test. The facts in that case were as follows: A father, upon his son's marriage, entered with his son into a joint and several covenant with the trustees of the marriage settlement, to pay a certain amount of money six months after his death, and had specifically charged some of his own property with payment of the same. The son, at the time of his marriage, was possessed of a reversionary interest only which he brought into the settlement. The father subsequently died insolvent, and the security had to be released. On this state of facts the court refused, in the absence of an express agreement, to infer an intention on the part of the father to reserve a right to his executors to sue the son for contribution.

The rule being that when parties stand in aequali jure, with reference to a contractual liability, equality of burden becomes equity: Crayton v. Johnson, 27 Ala. 503; it is necessary that the equities of the parties be equal to allow contribution: Huber v. Hess, 191 Ill. 305, 61 N. E. 61; Jenkins v. Craig, 22 Ind. App. 192, 53 N. E. 427, 52 N. E. 423; Allen v. Clark, 34 Mass. (17 Pick.) 47; Moore v. Moore, 11 N. C. (4 Hawks) 358, 15 Am. Dec. 523. A judgment against several is not conclusive that the defendants are in aequali jure, but is only prima facie evidence thereof: Dent v. King, 1 Ga. 200, 44 Am. Dec. 638.

The party seeking contribution must come into equity with clean hands. So where a judgment debtor, having paid off a judgment,

sued a codebtor for contribution, and the latter set up in his affidavit of defense that he had been informed that the suit in which the judgment was rendered had been abandoned; that nearly nine years after the commencement of that suit a supplemental complaint, without knowledge of the affiant was filed, the suit being practically tried on the supplemental complaint and answer; that a firm of lawyers who represented the defendant now suing for contribution undertook to appear for all the defendants, but that they failed to plead a prior discharge in bankruptcy of the present defendant, although they knew of the same, and he was given no opportunity to plead it, it was held that no recovery could be had for want of a sufficient affidavit of defense, the equitable principle of contribution applying only where the plaintiff's hands are clean, the affidavit of defense impugning the good faith of the plaintiff in his defense of the former suit: Flanagan v. Duncan, 133 Pa. St. 373, 19 Atl. 405, 25 Week. Not. Cas. 491.

It is not a principle of equity that when fraud is contrived against several persons, and succeeds as to one of them only, such a one is entitled to contribution from the others intended to be defrauded: Grubb v. Cottrell, 62 Pa. St. 23.

III. Common Charges or Encumbrances on Land.

The doctrine of contribution has been frequently applied to the discharge of encumbrances on real estate, the rule being that where land is charged with a burden, such charge ought to be equal, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling the owner of each part to a just contribution: Osborn v. Carr, 12 Conn. 195; Eliason v. Eliason, 3 Del. Ch. 260; Briscoe v. Power, 85 Ill. 420; Brown v. Shurtleff, 24 Ill. App. 569; Falley v. Gribling, 128 Ind. 110, 26 N. E. 794; Springer v. Foster, 27 Ind. App. 15, 60 N. E. 720; Griffith v. Lovell, 26 Iowa, 226; Taylor v. Porter, 7 Mass. 355; Allen v. Clark, 34 Mass. (17 Pick.) 47; Parkman v. Welch, 36 Mass. (19 Pick.) 231; Aiken v. Gale, 37 N. H. 501; Sawyer v. Lyon, 10 Johns. 32; Stevens v. Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499; Fisher v. Clyde, 1 Watts & S. 544; Beck v. Tarrants, 61 Tex. 402; Danforth v. Smith, 23 Vt. 247. And see Falley v. Gribling (Ind.), 22 N. E. 723; Morrison v. Warner, 200 Pa. St. 315, 49 Atl. 893. The estates of subsequent grantees who have purchased different parcels of encumbered property at different times are liable to contribute ratably, and not in inverse order of alienation, to the payment of a prior judgment lien: Massie v. Wilson, 16 Iowa, 390.

Dower is a charge upon land within the rule the same as any other encumbrance: Eliason v. Eliason, 3 Del. Ch. 260. Where, therefore, several tracts of land belonging to a judgment debtor are taken in execution against him, and he dies before the sale, and his representatives proceed to sell the land, assigning dower in the whole

estate upon the tract held by one of the levies, discharging the other tracts and distributing the proceeds to the judgments whose levies held the land, equity will compel the creditors receiving the proceeds of the land so discharged of dower to contribute to the creditor whose land was charged therewith, so much as to equalize the burden on each creditor according to the land held by his levy: United States Bank v. Delorac, Wright (Ohio), 285.

In order for contribution to be allowed, the equities of the parties must be equal. So where the owner of two lots, subject to a judgment lien, conveys one of them by general warranty deed, a subsequent purchaser of the second lot acquires only the rights which his grantor retained after the first conveyance and cannot demand contribution from the purchaser of the former, the equities not being equal: Jenkins v. Craig, 22 Ind. App. 192, 52 N. E. 423, 53 N. E. 427. In Huber v. Hess, 191 Ill. 305, 61 N. E. 61, a testator, who had mortgaged two lots, devised one of them to his son and the other to his daughter, the latter accompanied with the condition that she pay off the entire encumbrance on both lots. The court held that the lot devised to her was primarily liable for the encumbrance; and that if both lots were sold en masse on foreclosure, and a judgment creditor of the daughter thereafter alone redeems them, he is not entitled to contribution as to the son's lot.

Where a grantor appeared to be jointly bound in a deed to its whole extent, it was competent for him or his personal representatives to show that he was bound for only half thereof, as joint partner in the transaction, and that if no part of the land intended to be secured by his warranty was lost, as between his cograntee, he or his estate could not be bound to contribute anything: Cundiff v. Hail, 10 Ky. (3 A. K. Marsh.) 50.

IV. Principal Debtors and Co-contractors.

The principle of contribution grows out of the joint undertakings of the parties: Jobe v. O'Brien, 21 Tenn. (2 Humph.) 34; and applies as well to original co-contractors or principal debtors as to sureties: Chipman v. Morrill, 20 Cal. 130; Van Petten v. Richardson, 68 Mo. 379; Kimball v. Williams, 65 N. Y. Supp. 69, 51 App. Div. 616. It is not necessary that there should be a technical partnership: Finlay v. Stewart, 56 Pa. St. 183.

The right of contribution may be defeated by a wrongful or negligent act on the part of the one making payment: Rollins v. Taber, 25 Me. 144. The court there said: "It is generally true that, if one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his copromisor for the one-half of the amount so paid. But if the debt were originally due from some third person, and the security had been given therefor by the

copromisors, in consideration of funds furnished by him, with which it was agreed the debt should be paid, and such funds had been intrusted to the management of him, who had been compelled to pay the amount in discharge of the joint promise, and he had not been careful to appropriate the funds according to agreement, no promise could be implied, that he should be reimbursed for any portion of the amount he might have been compelled to pay on the joint contract." See, also, P. Dougherty Co. v. Gring, 89 Md. 535, 43 Atl. 912, where it was held that no contribution could be had between cocontractors where one of the parties did not carry out the contract as made.

In regard to the liability of codebtors on notes or bonds, the law is thus stated in Hodgson v. Baldwin, 65 Ill. 532: "The doctrine is well settled, when two or more are jointly, or jointly and severally, bound to pay a certain sum of money, and one or more of them is compelled to pay the whole debt, or more than his or their share, those paying may recover from the delinquents the proportion they ought to pay"; and this is borne out by numerous cases: Hoyt v. Lock, 41 Ill. 119; Dean v. Speakman, 7 Blackf. 317; Warring v. Hill, 89 Ind. 497; Judd v. Small, 107 Ind. 398, 8 N. E. 284; Goodall v. Wentworth, 20 Me. 322; Hardy v. Colby, 42 Me. 381; Packard v. Nye, 43 Mass. (2 Met.) 47; Labeaume v. Sweeney, 17 Mo. 153; Boardman v. Paige, 11 N. H. 431; Pully v. Pass, 123 N. C. 168, 31 S. E. 478; Craig v. Craig, 5 Rawle, 91. That no contribution may be had where the indebtedness is several, see McArthur v. Board, 119 Iowa, 562, 93 N. W. 580.

If the indebtedness be one for which both are liable, and one of the co-obligors discharges it, whether with or without suit, he is entitled to contribution: Pixley v. Gould, 13 Ill. App. 565. It is not necessary, however, that the whole debt be discharged. "It would be a harsh rule for a court of equity to enforce, to require of parties who had already paid more than their just proportion of a debt to compel them to pay all the residue before they could have relief; and it may frequently be they are unable to discharge such residue and the obligation resting upon them unless they first or concurrently get relief against the other joint contractors": Pixley v. Gould, 13 Ill. App. 565.

Where two persons give their joint obligation upon a consideration received by them jointly, each stands in the relation of surety to the other for one-half the debt: Crafts v. Mott, 4 N. Y. 604. Where a note, signed by principal and sureties, was renewed by the latter alone, they became joint principals and not cosureties in the new note, and if one of them paid it he was entitled to contribution from the other: Graziani v. Hall, 23 Ky. Law Rep. 2351, 67 S. W. 9.

In McBride v. Potter-Lovell Co., 169 Mass. 7, 61 Am. St. Rep. 265, 47 N. E. 242, a banker, holding promissory notes of several of his

customers for sale, pledged them at different times as security for a personal debt to one who took them in good faith, for value and without notice. The pledgee collected enough of these notes from time to time as they fell due, to satisfy his own claims. It was held that contribution should be decreed among all the owners of the notes, they all being pledged as security for the same indebtedness; and that the whole loss in consequence thereof should be borne by all the makers in proportion to the amounts of the notes pledged.

The right to contribution depends upon a common indebtedness, and not upon the fact that all the parties are bound in writing. So where a number of people agreed among themselves to purchase certain lands, and to furnish the money therefor equally and funds were borrowed from a certain bank, of which one of the above parties was president, but he did not sign the note given for the money on the ground that he was an officer of the bank making the loan, saying that the contract would show who were the parties, he was nevertheless held liable for contribution upon the failure of the enterprise: Timberlake v. Hughes, 65 Mo. App. 640.

Where the payment of interest upon a joint and several obligation protects the interests of both obligors, the one paying is entitled to contribution: McCready v. Van Antwerp, 24 Hun, 322.

In Murphy v. Gage (Tex. Civ. App.), 21 S. W. 396, one of four joint and several obligors on a note agreed to hold one of the others harmless, in order to induce him to sign it. It was held that he still had his right of action against the other two, even though they did not know of the existence of the agreement when signing the note.

Where a man purchased lots jointly with a woman, executing his notes with her in solido for the price, which he subsequently paid at maturity, he could not recover from her her proportion of the notes, where it was shown that the defendant had been debauched by the plaintiff and was living with him in illicit relations at the time of payment, which was made as a reparation for the injury done her: Labenelle v. Deconet, 2 La. Ann. 545.

Where a note is given for a transaction for which one of the makers receives no benefit, it has been held that he will not be forced to contribute: Hunt v. Hunt, 45 N. J. Eq. 360, 13 Atl. 248, 19 Atl. 623. In that case a person purchased three lots, and agreed to convey an undivided one-half to his brother. The two signed notes therefor, the brother relying on the agreement to convey; but no deed was ever delivered to him. Later the first brother executed a trust deed, covering the entire fee to two of the lots, to a third party, and then deeded to his brother a half-interest in the three lots, subsequently conveying an undivided half-interest in the third lot to his father. The court refused to allow contribution to the first brother, the other having received no benefit from the transaction.

Nor will contribution be decreed where the liability of one arises from contract and that of the other from a tort committed in connection therewith: Brannin v. Loving, 82 Ky. 370.

It is not necessary that payment be made in cash. Where, therefore, a note was executed by fourteen promisors, and was then taken up by four of them, who gave their own joint and several negotiable note in satisfaction thereof, this is such a payment as will enable the four to maintain an action for contribution against a copromisor in the first note: Chandler v. Brainard, 31 Mass. (14 Pick.) 285.

V. Assignment of the Right to Contribution.

The right to contribution is assignable: Pine Hill Coal Co. v. Harris, 7 Ky. Law Rep. 519; Pully v. Pass, 123 N. C. 168, 31 S. E. 478. In Dullenbeck v. Dygert, 97 N. Y. 303, 49 Am. Rep. 525, one of several accommodation makers of a joint and several promissory note paid it, and subsequently transferred it to a third person for a valuable consideration. This was held to pass the right to contribution to the transferee.

That a co-obligor may purchase the remedy of the obligee against the other obligor, and enforce it at law in the name of the obligee to procure contribution, see Smith v. Latimer, 54 Ky. (15 B. Mon.) 75.

VI. Presumptions as to the Liability of Co-obligors.

The possession of a joint note by one of the drawers, with a receipt of payment by the holder or possessor indorsed on it, is prima facie evidence of the liability of the other drawer to refund one-half of the note: Ingram v. Croft, 7 La. 82. The presumption of equal responsibility for the ultimate payment of a note by two or more promisors may be rebutted by showing that one signed for the accommodation and as surety for the other: Harris v. Brooks, 38 Mass. (21 Pick.) 195, 32 Am. Dec. 254. And in an action by one obligor on a bond against his co-obligor for contribution, the real amount for which each is bound may be shown by parol: Paulin v. Kraighn, 27 N. J. L. 503.

VII. Agreements to Support Third Persons.

Where, under an agreement, certain persons agree to care for and support others, if one of them does so out of his own means, the other will be compelled to contribute his share: Jacobsmeyer v. Jacobsmeyer, 88 Mo. App. 102; Odiorne v. Moulton, 64 N. H. 211, 9 Atl. 625.

VIII. Judgment Debtors.

a. In General.—A judgment debtor, in actions founded on contract or quasi contract, is entitled to contribution from the other debtors if he pays the whole or more than his share of the judgment: Thomas v. Hearn, 2 Port. (Ala.) 262; Dent v. King, 1 Ga. 200, 44

Am. Dec. 638; Dupuy v. Johnson, 4 Ky. (1 Bibb) 562; In re Wheeler, 1 Md. Ch. 80; Ruckman v. Decker, 28 N. J. Eq. 5; Scribner v. Hickok, 4 Johns. Ch. 530; North America Fire Ins. Co. v. Handy, 2 Sand. Ch. 492; Neilson v. Neilson, 5 Barb. 565; Power v. Rees, 189 Pa. St. 496, 42 Atl. 26. So where two vendors of land jointly covenanted to warrant and defend the title, and the vendee was evicted by paramount title, and recovered a joint judgment against them on their warranty, which one of them paid, he is entitled to maintain an action of debt against the other to recover his proportion: Hickman v. Searcy, 17 Tenn. (9 Yerg.) 47. Where a debtor of one of two joint contractors, against whom judgment was rendered on a joint obligation, is garnished, he may make his co-contractor contribute for his part of the debt satisfied by the garnishment, although the debtor garnisheed has been given time for the payment of the judgment against him: Gillilan v. Nixon, 26 Ill. 50.

In an action against several defendants, jointly and severally liable, where judgment is for the plaintiff against one of them alone, he may, upon paying it, compel contribution from the others: Hoxie v. Farmers' etc. Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637. In Schneider Granite Co. v. Taylor, 64 Mo. App. 37, it was held that a valid judgment might be rendered in an action on a special tax bill against the property charged, without bringing in all the parties in interest, but if all the co-owners were not made parties, and those who were paid the judgment, they could force the remainder to contribute. And the plaintiff in the suit for contribution is under no obligation to plead in abatement for failure to join the other parties, they having knowledge of the suit, and an opportunity to join in the defense: Security Ins. Co. v. St. Paul etc. Ins. Co., 50 Conn. 233. But see Murray v. Bogert, 14 Johns. 318, 7 Am. Dec. 466, to the effect that where a person has paid a judgment recovered against him, to which another not a party to the suit was jointly liable, no contribution could be obtained from him, the court saying: "They were not made parties, nor did the defendants in that suit plead in abatement that they ought to have been made parties. That judgment, therefore, shows no privity or joint responsibility between the defendants in that judgment and the defendants in this suit."

Where a party is entitled to sue several for contribution, he cannot take a judgment in solido against all, each defendant being liable only for his proportion of the debt that has been paid on his account: O'Brien v. Drexilius, 7 Ky. Law Rep. 519.

In White v. Brown, 29 N. J. L. 307, it was held that where one defendant paid off a judgment, he could not use it to collect of his codefendants the share they were liable to pay, his remedy being by action for money paid out. And see Mehaffy v. Share, 2 Penr. & W. (Pa.) 361.

Where an execution issued against several defendants is voidable as to some and good as to others, the one satisfying it is entitled to

contribution from his codefendants: Stark v. Carroll, 66 Tex. 393, 1 S. W. 188.

The party sued for contribution cannot plead that the court had no jurisdiction to render the judgment: Harvey v. Drew, 82 Ill. 606, where it is said: "It is, therefore, wholly immaterial whether defendant was served with process in the suit in New York or not. It is not sought, in this action, to enforce that judgment, or any obligation arising under it, against defendant. It is not, in any sense, the foundation of the action. No doubt it was a valid judgment against plaintiff, and it is pleaded simply to show in what manner plaintiff paid the indebtedness for which he and his co-obligors were liable. But the same obligation would have rested upon defendant to pay his aliquot share, had plaintiff discharged their joint indebtedness without suit."

No action for contribution lies by one indorser against another, equally bound with him, where execution was recovered against the former and was satisfied by a levy on real estate and a sale of his equity of redemption, where such debtor, subsequent to the attachment but prior to the levy and sale had conveyed his interest in that property. Such satisfaction, being from the property of the grantee of the judgment debtor, cannot be considered as payment by the debtor: Mussey v. McLellan, 19 Me. 161.

b. **Statutory Modifications.**—The right of one judgment debtor to enforce contribution from another has been varied by statute in some jurisdictions. So in Georgia, it is provided when judgments have been obtained against several persons, and one or more of them has paid more than his just proportion of the same, such party may, by having such payment entered on the fieri facias issued to enforce the judgment, have full power to control and use it against principal or cosureties, and is not compelled to sue the codebtors for the excess of payment on such judgment: Green v. Mann, 76 Ga. 246. And in Minnesota, by statute, where one of several debtors, against whom there is a joint judgment, pays more than his proportion, and files notice of his payment and claim to contribution, he is ipso facto subrogated to the right of the judgment creditor in that judgment: Ankeny v. Moffett, 37 Minn. 109, 3 N. W. 320. See, also, Worden v. Jones, 1 Kan. App. 501, 40 Pac. 1071.

Where the right of such judgment debtor to enforce contribution depends upon the condition that he file with the clerk, within ten days after his payment of more than his proportion of the judgment, a notice of his payment and claim to contribution, it is not necessary that he serve the notice so filed upon the parties from whom contribution is sought within the period of ten days: Clark v. Austin, 96 Cal. 283, 31 Pac. 293.

c. **Costs of Litigation.**—As to how far the parties are liable to contribute for costs and expenses of litigation, the general rule is stated in Newcomb v. Gibson, 127 Mass. 396, to be that "the right of con-

tribution does not extend to any part of the cost paid or the expense incurred by one of two or more parties subject to a joint liability in attempting to defend himself against the claim, unless authorized by those who are jointly liable: Knight v. Hughes, 3 Car. & P. 467. This rule does not apply where the cost is recovered in a judgment against all the joint obligors, for there the cost has become a common burden, and each may recover of the others for the payment of more than his due proportion: Boardman v. Paige, 11 N. H. 431; Davis v. Emerson, 17 Me. 64.

Where an action is commenced by the holder of a note against all the cosigners, and judgment is recovered against one only, upon payment of the damages and costs of the judgment, the party against whom the judgment is recovered is not entitled to contribution from the other cosigners in respect of the costs, such not being a burden common to them all: Boardman v. Paige, 11 N. H. 431. Nor is contribution to be had among several judgment debtors on account of expenses incurred in defending the suit in which the judgment was rendered, in the absence of an agreement to bear the expenses jointly: Hayes v. Morrison, 38 N. H. 90.

Van Petten v. Richardson, 68 Mo. 379, holds that contribution applies not only to the principal debt, but also to all costs necessarily incurred. Where a creditor files a bill for the discovery of assets, whether for himself alone or jointly for all the creditors, a creditor coming in under the decree must contribute ratably to the expenses of the suit, although he had a judgment and execution which he might have enforced at law, but failed to do so till the fund was in court: Manigault v. Deas, Bail. Eq. (S. C.) 283.

Where a probate judge appointed commissioners to partition real estate, and all their fees were paid by the petitioners in the suit, the latter were entitled to contribution from all other parties in interest: Potter v. Hazard, 93 Mass. (11 Allen) 187. So where one party pays all the fees of arbitrators appointed by the court, and takes an assignment of their claim, he may recover one-half thereof from the other party: Russell v. Page, 147 Mass. 282, 17 N. E. 536.

IX. Sureties.

Sureties may claim contribution from each other in proportion to the amount paid by each on the common debt: White v. Banks, 21 Ala. 705, 56 Am. Dec. 283; Boardman v. Paige, 11 N. H. 431; Graves v. Smith, 4 Tex. Civ. App. 537, 23 S. W. 603; and the liability is primary, and not conditional upon the inability of the surety to recover from the principal: Taylor v. Reynolds, 53 Cal. 686; Boyer v. Marshall, 8 N. Y. St. Rep. 233. All that is needed is that the parties be security for the same debt, whether by the same or different instruments, at different time: Golsen v. Brand, 75 Ill. 148; or whether jointly or severally bound: Craig v. Ankeney, 4 Gill (Md.), 225; Norton v. Coons, 3 Denio, 130, affirmed in 6 N. Y. 33.

In Stockmeyer v. Oertling, 35 La. Ann. 467, it is said: "Solidarity of obligation is not a prerequisite to the possession or exercise of the right to enforce contribution. The three necessary conditions are that the surety who is demanding contribution, and the surety from whom it was demanded, must each have been surety for the same debtor, and for the same debt, and satisfaction for the debt must have been enforced against the surety demanding contribution by a lawsuit." If a person becomes a surety at the request of his cosurety, the former is absolved from all responsibility to contribute, and if the latter is forced to pay, he may recover the entire amount from the cosurety who requested him: Byers v. McClanahan, 6 Gill & J. 250.

For a more complete discussion of contribution among cosureties in this series, see the notes in 10 Am. St. Rep. 639-647, and 70 Am. St. Rep. 444-451.

X. Effect of the Discharge of One Joint Debtor.

The discharge of the direct liability of one cosigner to the holder of a note will not relieve him from his liability to contribute to the other signers of the note, unless it is of such a character as to release the others also, whether a result of the contract of the holder of the note, or of the operation of the statute of limitations: Boardman v. Paige, 11 N. H. 431.

A discharge of one of two joint debtors under the insolvent act before payment by his codebtor, will not affect the claim of the codebtor for contribution against the one discharged, if the debt was paid subsequent to the insolvent assignment, the payment in such a case creating a demand arising after the discharge: Ransom v. Keyes, 9 Cow. 128; Ellsworth v. Caldwell, 27 How. Pr. 188.

In Virginia it is provided by statute that the release of one joint obligor by the creditor does not impair the right of contribution as between the co-obligors: Penn v. Bahnson, 89 Va. 253, 15 S. E. 586.

XI. Miscellaneous Instances of Contribution.

While contribution has arisen most frequently in the case of codebtors and cosureties, it has also been applied to persons standing in a different relation toward each other, in order to equalize a burden in which each ought to share. Where there were four joint executors of an estate, who gave a joint bond for faithful administration, two of whom ultimately became insolvent, and one of the remaining two was compelled, under a decree of court, to pay for property which, without any fault on his part, had been wasted by one of the insolvent executors, before his insolvency, it was held that the executor making such payment was entitled to receive contribution of one-half from the other solvent executor of the money so paid and of the expenses incurred in defending the suit in

chancery: Marsh v. Harrington, 18 Vt. 150. Where an insolvent makes an assignment of part of his estate for the benefit of one set of creditors, and then assigns the residue to another set of creditors, and one fund pays off an entire debt, it is entitled to contribution from the other: Downing v. Kintzing, 2 Serg. & R. (Pa.) 326.

In Wolters v. Henningsan, 114 Cal. 433, 46 Pac. 277, some of the stockholders of a corporation had been compelled to pay a certain tax, for which all of the stockholders, as individuals, were jointly and severally liable; and the parties so paying were entitled to contribution from the others. In Elbert v. Haebler, 149 N. Y. 343, 43 N. E. 914, it was held that, where an employé sued his employer for certain profits, in accordance with an agreement between them, a settlement should be allowed in spite of the fact that third parties were asserting outstanding claims, which would reduce the amount due to the plaintiff, and that if judgment subsequently went against the defendant, he would have a good claim for contribution against the plaintiff.

XII. The Statute of Limitations.

a. When It Starts to Run.—The statute of limitations does not run against a right to contribution until after payment of the debt or judgment by the plaintiff, or of more than his proportionate share, as no cause of action accrues till then: Sherwood v. Dunbar, 6 Cal. 53; Richter v. Henningsan, 110 Cal. 530; reported as Richter v. Blasingame, 42 Pac. 1077; Singleton v. Townsend, 45 Mo. 379; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Durbin v. Kuney, 19 Or. 71, 23 Pac. 661; Singleton v. Moore, Rice Eq. (S. C.) 110; Culmer v. Wilson, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833. Where a joint maker of a note pays the same before maturity, the statute does not begin to run against his right of contribution from his comaker until the maturity of the note: Truss v. Miller, 116 Ala. 494, 22 South. 863.

Where one copartner, who has the management of partnership property, pays an obligation for which all the partners are equally bound, he has a right, in the settlement of the accounts with his copartners, to credit himself with such payment, and prescription cannot run as long as the account of his administration is unsettled: De Lallande v. De Lallande, 10 La. Ann. 220. In Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751, it is held that a right of action for contribution by members of a committee who have subscribed funds to aid a railroad and guaranteed a free right of way, does not accrue upon the advancement of money or the assumption of liability by any of them in excess of his subscription, but only when subscriptions have been collected and paid out, the road obtained, and the railroad company settled with.

Two judgment debtors purchased, by mutual agreement, real estate of their debtor at a sheriff's sale, as tenants in common, paying

largely for the same by receipts on their judgments, and one paid more than the other. In an action for contribution for the excess, the statute of limitations was held to run against that right from the date of the delivery of the sheriff's deed: McCormick v. Sener, 200 Pa. St. 11, 49 Atl. 311.

In Trustees v. Lawrence, 11 Paige, 80, it was held that in case one of two joint debtors died, no right of action accrued to the creditor against his representative until the surviving debtor became insolvent or irresponsible, and that the statute did not begin to run till then.

b. Nature of the Action.—It next becomes necessary to determine the nature of the action in order to apply the appropriate statute thereto. Where one joint debtor pays a note, and then sues for contribution, the cause of action is based on an implied contract of the other to repay, and is governed accordingly by the statute of limitations: Sexton v. Sexton, 35 Ind. 88; Faires v. Cockerell, 88 Tex. 428, 31 S. W. 190, reversing 29 S. W. 669. But see Murphy v. Gage (Tex. Civ. App.), 21 S. W. 396, holding that where one joint and several obligor paid off a note, he was subrogated to the rights of the payee as against his co-obligors, and his cause of action was founded on a written instrument.

Laches may bar the right of one co-obligor to contribution from another: Doughty v. Bacot, 2 Desaus. (S. C.) 546; but if the lapse of time has not worked a bar, mere passiveness in asserting his rights cannot prejudice him: Owen v. McGehee, 61 Ala. 440.

c. Right to Contribution for Payment of Debt Barred by Limitation.—The general rule is that where one joint debtor pays a debt which is barred by limitation, without the consent of his codebtor, he is not entitled to contribution from him: Buck v. Spofford, 40 Me. 328; Ellicott v. Nichols, 7 Gill (Md.), 85, 48 Am. Dec. 546; Wheat Field v. Brush Valley Township, 25 Pa. St. 112. See, also, Turner v. Thom, 89 Va. 745, 17 S. E. 323. A contrary view is held in Mills v. Hyde, 19 Vt. 69, 46 Am. Dec. 177. So no contribution can be compelled where one of the signers of a joint and several note, which fell due in 1807, was sued thereon in 1814, and a judgment recovered, which was suffered to lie dormant sixteen years, then revived, and finally paid thirty-eight years after it became payable: Williamson v. Rees, 15 Ohio, 572; Williamson v. Collins, 17 Ohio, 354.

In Peaslee v. Breed, 10 N. H. 489, 34 Am. Dec. 178, and Whipple v. Stevens, 19 N. H. 150, it was held that where the remedy of one joint maker of a promissory note was good, but was barred against the other, and the former paid the debt, he might still force contribution from the latter. But see Shelton v. Farmer, 72 Ky. (9 Bush) 314, holding that a surety against whom judgment was recovered, and who paid the debt, could not sue a cosurety for contribution,

where the cause of action was barred as to him at the date of the judgment.

XIII. Measure of Contribution.

a. In General.—A co-contractor suing another for contribution is entitled to recover one-half of the loss actually sustained: Snyder v. Kirtley, 35 Mo. 423. And evidence is admissible to show the actual cost to the person paying: Hanna v. Drennan, 2 Posey U. C. (Tex.) 536. His right to contribution extends only to the excess paid over his proportionate part: Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497; Currier v. Fellows, 27 N. H. 366; Merchants' Nat. Bank v. McAnulty, 89 Tex. 124, 33 S. W. 963; and the fact that one has entered into a compromise whereby he pays less, does not alter this rule: Glasscock v. Hamilton, 62 Tex. 143. The court there said: "The equitable right to contribution, which is administered at law, as well as in equity, proceeds upon acknowledged principles of equality and justice, and those principles require that where one jointly bound by a common obligation to pay the debt of another shall pay more than his ratable share of it, that the other shall reimburse him therefor. But if such party shall obtain his own discharge by the payment of less than his ratable proportion of the whole debt, and leave his fellow-surety liable to pay to the creditor his own original full share of the debt, there is no rule that can be deduced from these maxims of equality and justice on which to raise an assumpsit that such cosurety should contribute to that one who has thus compromised, paid and obtained his discharge. Whilst each surety is, as to the creditor, liable for the whole debt as between himself and his cosureties, he is liable to contribution to those paying the debt to no more than his equal portion ratably distributed between those who are solvent and able to sustain with him the common burden": See, also, Fuselier v. Baineau, 14 La. Ann. 764, holding that when a solidary codebtor pays in discharge of a debt less than the whole amount, he can claim reimbursement only as to his codebtor's portion of the amount paid.

The loss to be borne is according to the benefit received. So, where three borrow money jointly, but appropriate individually unequal sums, the benefit to each is according to the amount appropriated by each; and if one becomes insolvent, the other two should bear the loss in proportion to the sum employed by each for his own use: Kincaid v. Hocker, 30 Ky. (7 J. J. Marsh.) 333; Green v. Anderson, 19 Ky. Law Rep. 1187, 43 S. W. 195; In re Wheeler, 1 Md. Ch. 80.

A co-obligor, who has discharged a common indebtedness, is entitled to be reimbursed in funds of the same kind with which he paid the debt, even though they have since advanced in value: Klein v. Mather, 7 Ill. 317. But where one codefendant pays a debt in specie, he cannot recover of another codefendant specie, where he had the

right to make payment in depreciated bank bills: Walker v. Municipality No. 1, 5 La. Ann. 10. The same rule as to the measure of contribution applies to the payment of interest, and where one tenant in common is obliged to pay off an encumbrance on the entire estate to save his own interest therein, and the debt is drawing ten per cent interest, he is entitled to recover the same rate: Simpson v. Gardiner, 97 Ill. 237.

Contribution may be obtained on the basis of the amount actually expended, if reasonably done. So, where two persons are jointly liable to maintain a dam, and one of them neglects to do so, the other may recover in proportion to the sum he had actually spent, if he had prosecuted the work as cheaply as he could under the circumstances in which he was placed; and the fact that a man of experience in such matters, with ample means and in favorable circumstances, could have built it for less, does not make any difference: Webb v. Laird, 62 Vt. 448, 22 Am. St. Rep. 121, 20 Atl. 599.

Where two persons buy land and execute a mortgage thereof to the vendor, and one of them purchases the land upon foreclosure for less than the amount of the debt, himself paying the remainder, he may recover one-half of the difference between the purchase price and the amount of the debt, where he paid the remainder in order to obtain his discharge and to hold the defendant for the amount of his indebtedness: Roehl v. Porteous, 47 La. Ann. 1582, 18 South. 645.

The sum to be contributed by each of several defendants in satisfaction of a debt recovered against them may be determined in the suit in which the decree was rendered: Hickey v. Dole, 66 N. H. 612, 31 Atl. 900.

Where, by mistake, a judgment is one thousand dollars less than the real amount due, the defendant in correction of the mistake making the payment of the thousand dollars, he is entitled to have that amount taken into consideration when sued for contribution by a codebtor who paid the amount of the judgment: Hosmer v. Burke, 26 Iowa, 353.

b. **Where Part of the Debtors are Insolvent.**—A distinction has been made as to apportionment where some of the parties are insolvent, between suits in equity and actions at law. In the former, the insolvent co-obligors are not counted, but those who are solvent must bear the entire debt among them; while in the latter, their insolvency does not eliminate them from the entire number in adjusting the amount for which each is liable: In re Kalbach, 2 Woodw. Dec. (Pa.) 415. In Van Petten v. Richardson, 68 Mo. 379, after mentioning this distinction, it is said: "It would seem quite obvious that courts of law, in adopting the views of equity relative to contribution, should have done so in their fullest extent, and consequently, when they allowed a recovery based on an equitable right,

they should have made that recovery as broad as the right in which it had its origin, and, therefore, should have afforded a relief as large as could have been afforded, had that relief been sought in that forum which first gave recognition to the right. Mr. Justice Redfield, after adverting to the fact that some of the American courts of law now follow the equitable rule as to apportioning the share of an insolvent surety among those remaining solvent, says: 'The distinction in the extent of redress between a court of law and a court of equity, in cases where some of the sureties are insolvent, is certainly not based upon any very obvious principle affecting the different jurisdictions. It has more the appearance of an arbitrary rule, and as such may be expected to gradually disappear in the same way most of its kindred have already done': 1 Story's Equity Jurisprudence, sec. 496a. And the current of modern authority is in accordance with the views indicated by Mr. Justice Redfield." The following decisions hold that the entire debt should be distributed among the solvent debtors: Young v. Lyons, 8 Gill (Md.), 162; Parker v. Ellis, 4 N. Y. Super. Ct. (2 Sand.) 223; In re Kalbach, 2 Woodw. Dec. (Pa.) 415; First Nat. Bank v. Eckbert, 3 Walk. (Pa.) 41; Harris v. Ferguson, 2 Bail. (S. C.) 397; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; and see, also, Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786; and a co-obligor beyond the jurisdiction of the court is considered the same as insolvent for purposes of contribution: McKenna v. George, 2 Rich. Eq. (S. C.) 15. Where, therefore, one solvent debtor pays the share of an insolvent, he is entitled to contribution for the amount thus paid from the other solvent debtors: Norris v. Churchill, 20 Ind. App. 668, 51 N. E. 104.

XIV. Enforcement of the Right.

a. Plaintiff must Pay More than His Proportionate Share.—If the party making payment pays no more than his proportion, he cannot recover contribution, even though his codebtor has paid nothing: Sawyer v. Lyons, 10 Johns. 32; or, as it is stated in Township of Canosia v. Township of Grand Lake, 80 Minn. 357, 83 N. W. 346: "The mere fact of his own liability is not sufficient to enable a party to enforce contribution. There must be a payment, or such assumption of the demand as imposes upon the claimant more than his share, and a corresponding release against those from whom he claims": See, also, Powers v. Gowen, 32 Me. 381; Merchants' Nat. Bank v. McAnulty (Tex. Civ. App.), 32 S. W. 376; Garfield v. Faskett, 57 Vt. 290. That contribution cannot be compelled until the plaintiff has made satisfaction, see Webster v. Gage, 2 Mass. 503; Weidenmeyer v. Landon, 66 Mo. App. 520. And if a debt is discharged by the execution of a note by one obligor, he is entitled to contribution from the others the same as if money had been paid: Green v. Anderson, 19 Ky. Law Rep. 1187, 43 S. W. 195.

In Springer v. Foster, 21 Ind. App. 15, 60 N. E. 720, it is held that a person who has paid a mortgage partly secured on his land and partly on that of another is not entitled to be subrogated to the creditor's rights unless the whole debt has been paid. So, in Kirkpatrick v. Murphy, 3 N. J. L. 951, it was considered no ground of action that an execution of judgment was obtained against the plaintiff and defendant jointly; but that the former must be compelled to pay the whole or do so at the request of the defendant. But see Pixley v. Gould, 13 Ill. App. 365.

b. **All must be Liable for the Claim.**—The right to contribution arises only where one of the parties has paid a claim for which all were liable: Andrews v. Murray, 33 Barb. 354. So, if one cosurety pays a void obligation, he must bear the entire loss: Russel v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631. See, also, Gray v. Krah, 6 Mo. App. 595, where one paid a street assessment for which the defendant was not legally liable, and he was held not entitled to contribution.

XV. Jurisdiction of Courts of Law and Equity.

The right to sue in equity for contribution was formerly an established head of chancery jurisdiction: Couch v. Terry, 12 Ala. 225; but courts of law have now adopted it: Jeffries v. Ferguson, 87 Mo. 244; Weidenmeyer v. Landon, 66 Mo. App. 520; Hanna v. Hyatt, 67 Mo. App. 308. And see Soule v. Frost, 76 Me. 119. Courts of equity have not, however, been ousted of their jurisdiction in matters of this kind on account of the assumption thereof by the law courts, but their jurisdiction is now considered concurrent: Thomas v. Hearn, 2 Port. (Ala.) 262; Chipman v. Morrill, 20 Cal. 130; Mitchell v. Sproul, 28 Ky. (5 J. J. Marsh.) 264; Craig v. Ankeny, 4 Gill (Md.), 225; Owens v. Collinson, 3 Gill & J. (Md.) 25; McGunn v. Hanlin, 29 Mich. 476; Walker v. Cheever, 35 N. H. 339; Williams v. Craig, 2 Edw. Ch. 297; Rindge v. Baker, 57 N. Y. 209, 15 Am. Rep. 473; Boyer v. Marshall, 8 N. Y. St. Rep. 233; Glasscock v. Hamilton, 62 Tex. 143; Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751.

The common remedy at law in an action for contribution is assumpsit: Taylor v. Reynolds, 53 Cal. 686; Bailey v. Bussing, 29 Conn. 1; Carroll v. Bowie, 7 Gill (Md.), 34; Van Petten v. Richardson, 68 Mo. 379; Oldham v. Broom, 28 Ohio St. 41.

XVI. Parties.

In an action for contribution, all persons interested should be made parties: Mateer v. Cockrill, 18 Tex. Civ. App. 391, 45 S. W. 751. In Hoyt v. Tuthill, 33 Hun, 196, speaking of an action of this character in equity, it is said: "All the persons liable are properly made parties in order that their several interests may be adjusted and the amounts for which they are respectively liable may be as-

certained. Besides, although the liability of each defendant for his quota is several, and may be enforced in an action at law: Cowell v. Edward, 2 Bos. & P. 268; yet where the co-obligors are numerous, they may be joined in one action in equity to prevent multiplicity of suits: Craythorne v. Swinburne, 14 Ves. Jr. 160; Pomeroy's Equity Jurisprudence, sec. 1418, and note 1 and cases there cited." In Carr v. Waldron, 44 Mo. 393, it was held that in a suit for contribution by one of several grantees in a mortgage against another, all the mortgagees have an interest, and if not all joined, it is bad against demurrer, a statute providing that all persons who are united in interest must be joined as plaintiffs or defendants. In a suit for contribution on a bond, the obligees of the bond need not be made parties: Hyde v. Tracy, 2 Day (Conn.), 491. And where one joint surety seeks to enforce contribution from another, if the principal obligor and the other sureties are insolvent, he need not make them parties: Byers v. McClanahan, 6 Gill & J. (Md.) 250; Young v. Lyons, 8 Gill (Md.), 162. That the only defendant within the jurisdiction of the court may be made to contribute, see Security Ins. Co. v. St. Paul etc. Ins. Co., 50 Conn. 233.

If one joint maker of a note pays it after suit brought, he cannot, in law, prosecute the action for contribution in the name of the payee: Hendrickson v. Hutchinson, 29 N. J. L. 180. So, where several judgments are rendered for the same debt, satisfaction of one will operate to discharge the others; and if one of the defendants has a claim on the other for contribution, he must sue therefor in his own name: Abercrombie v. Conner, 10 Ala. 293.

Where a common debt is contracted by several persons, and one pays it, he may sue each of the others separately at law for his proportionate share, but cannot maintain a joint action against a part of them: Parker v. Ellis, 4 N. Y. Super. Ct. (2 Sand.) 223. See, also, Burnham v. Steele, 8 N. H. 182.

XVII. Pleading and Evidence.

The right of a co-obligor to contribution must be sustained by proof that he has paid more than his due share of the joint obligation: Morrison v. Warner, 197 Pa. St. 59, 46 Atl. 1030. In Screven v. Joyner, 1 Hill Eq. (S. C.) 252, 26 Am. Dec. 199, it is held that he must show that his payment has removed a common burden from the defendant and himself; and that the defendant has received benefit from such payment. No request of the defendant to pay is necessary: Hoyt v. Tuthill, 33 Hun, 196.

The declaration in an action for contribution by one judgment debtor against another for discharging the judgment must set forth the character of action in which it was rendered, as it may have been on a cause of action for which no contribution will lie; as in case of torts: Bailey v. Bussing, 29 Conn. 1. In Catheart v. Foulke, 13 Mo. 561, the court held that where the owner of a slave sued plain-

tiff as part owner of a steamboat, and recovered damages for the loss of the slave while employed upon the boat, and the plaintiff sued the defendant as joint owner of the boat for contribution, he could not recover unless he made out a state of facts which would entitle the owner of the slave in the first instance to a judgment against the owners of the boat.

A petition for contribution is good against demurrer, which alleges that a judgment was recovered against the plaintiff and defendant for a certain sum in debt, all of which the plaintiff paid: Gaster v. Waggoner, 26 Ohio St. 450.

Payment of a joint indebtedness may be proved either by the verbal or written confession of the person to whom payment should be made, and his receipt is prima facie evidence that it has been made: Ballance v. Frisby, 3 Scam. (Ill.) 63. But the mere production of a note by the plaintiff, executed by himself and defendant as comakers, and canceled by the stamp of a bank, is not prima facie sufficient to entitle him to contribution: Bates v. Cain, 70 Vt. 144, 40 Atl. 36; nor is the mere possession of a bond by one obligor evidence that he paid the whole debt: Craig v. Craig, 3 Rawle (Pa.), 472, 24 Am. Dec. 390.

Parol evidence is admissible to show the real nature of the transaction in a suit for contribution, where there is no written contract fixing the relation and liability between accommodation parties to a note: Oldham v. Brown, 28 Ohio St. 41.

XVIII. Notice of Satisfaction and Demand Unnecessary.

Neither notice of satisfaction of the principal obligation nor demand for contribution is necessary before the commencement of the action: Taylor v. Reynolds, 53 Cal. 686; Chaffee v. Jones, 36 Mass. (19 Pick.) 260. Where a statute requires notice to be filed by one of several judgment debtors who has paid more than his share of the judgment, in order to give him the benefit of the judgment in enforcing contribution, such notice need not be given where he seeks contribution in an independent action: City of Fort Scott v. Kansas City etc. R. Co., 66 Kan. 610, 72 Pac. 238.

ESTATE OF HARRINGTON.

[140 Cal. 244, 73 Pac. 1000.]

EVIDENCE—Law of Other States—Presumption Respecting. Where the law of another state is not proved, it will be presumed to be the same as the law of the forum. (p. 52.)

MARRIAGE BY PERSON having a Living Spouse—When Valid—Until Declared Void.—By the Civil Code of California, if a marriage has been contracted by a person previously married, but whose spouse was absent and not known to be living for the space of five successive years, or generally reputed to be dead, and so believed by such person at the time the second marriage was contracted, it is valid until its nullity is declared by a competent judicial tribunal. Its continuing validity is not affected by the fact that the parties thereto, hearing that the person was not dead, ceased to live together as husband and wife. The first marriage ceased to be binding until one of the three parties procured a decree pronouncing the second void. (p. 53.)

ESTATES OF DECEDENTS—Homestead cannot be Set Off to Wife Who has Innocently Contracted a Second Marriage.—If a wife whose husband has been absent and not known to be living for more than five years, and whom she believed to be dead, contracts a second marriage, it, until annulled, is valid and prevents her from having a homestead set aside to her out of the estate of the first husband after his decease, although, upon hearing that he was not dead, she ceased cohabiting with her second husband. (p. 53.)

HUSBAND AND WIFE—His Duty to Keep Her Informed of His Whereabouts.—If a husband is absent from his wife, he should keep her informed of his whereabouts, and a second marriage, contracted after he has been absent and not heard from for more than five years, cannot be pronounced void on the ground that she made no endeavor to ascertain his whereabouts. (p. 54.)

M. C. Hassett and Samuel Shortridge, for the appellant.

Heller & Powers, Beverly L. Hodghead, Charles A. Mau and Martin Stevens, for the respondents.

246 LORIGAN, J. This is an appeal from an order denying an application to set aside a homestead. The facts are brief, and as found by the lower court are, that John P. Harrington, the deceased, and appellant intermarried in Calumet, Michigan, in 1874, where a week after the marriage the decedent left her and came west, ultimately settling in the city of San Francisco. After he left her, and between 1874 and 1876, he wrote her four letters and sent her some sums of money. Subsequent to the latter year she received no communication from him or information of his whereabouts and it was generally reputed in Calumet, where she continued to live, that he was

dead, and she so believed him to be. In 1886 at Calumet she remarried in good faith one James Carley. After her marriage to Carley, rumors having reached Calumet that Harrington was alive, she and Carley voluntarily separated and his present whereabouts are unknown. No annulment, however, of the second marriage was had.

In 1900 Harrington died in San Francisco, leaving, in addition to other property, a lot in said city suitable for a dwelling place, which respondent, having come from Michigan to California, petitioned the probate court to set apart to her as a homestead, which was denied.

This case comes within a very narrow compass, the only point involved being whether the respondent is the widow of the deceased. The lower court held that she was not, and we think that determination was correct. While it is contended by appellant that by the law of Michigan the second marriage to Carley was absolutely void, there was no proof of such law, and it must be assumed that the law of Michigan is similar to [247] that of this state (Estate of Richards, 133 Cal. 526, 65 Pac. 1034), and that the second marriage, instead of being void, was voidable merely. Our Civil Code (section 61), as it stood in 1886, when this marriage of Carley took place, provided that "a subsequent marriage contracted by any person during the lifetime of a former husband or wife of such person . . . . is illegal and void from the beginning, unless . . . . 2. Such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and so believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." It will be noticed that by express provision of this section "the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." There are some jurisdictions in which it has been held that after such second marriage, when it was discovered that the former husband or wife was alive, an annulment of the second marriage could be created by the parties thereto themselves, through a separation. This doctrine, however, does not obtain in this state where, as above indicated, the annulment can only be had by a judgment of the court: Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957.

The general rule of law upon this subject is as stated in Tiffany on Persons and Domestic Relations (page 37): "Where a marriage is merely voidable, and voidable by a decree of nullity only, it is valid unless a decree is obtained, and the decree must be made, if at all, during the lives of both parties. Until it is made the marriage is valid for all purposes. The children are legitimate; the parties are entitled respectively to curtesy and dower; and all other incidents of a valid marriage attach."

In New York, which has a statutory provision similar to our section 61 of the Civil Code, the court, in Gall v. Gall, 114 N. Y. 120, 21 N. E. 106, says: "The first marriage is suspended, as was held in Griffin v. Banks, 24 How. Pr. 213. It is placed in abeyance, but it is not reinstated by return of absentee, because the second marriage becomes void only from the time when it is so declared by a competent court. Otherwise, both marriages would be in force at the same time, and, to this extent, polygamy would [248] be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the marriage procures a decree pronouncing the second marriage void": Gall v. Gall, 114 N. Y. 120, 21 N. E. 106; Velleau v. Velleau, 6 Paige, 209; White v. Lowe, 1 Redf. 379; Griffin v. Banks, 24 How. Pr. 213. It would seem from the above cases that not only is the second marriage valid until annulled, but that in the event of the death of Carley appellant would have respectable authority upon which to make claim to the rights of a widow in his estate.

Be that as it may, however, her right to have the court set apart to her as a homestead, property of the estate of Harrington, can be based only on the fact that she is his widow. As we have seen, her marriage with Carley being valid and never annulled, she is still his wife. She cannot, then, at the same time and under these circumstances, be the wife of Carley and the widow of Harrington.

The cases cited by appellant (In re Eichhoff, 101 Cal. 600, 36 Pac. 11; Estate of Newman, 124 Cal. 688, 57 Pac. 686; Estate of Richards, 133 Call. 524, 65 Pac. 1034; Harris v. Harris, 136 Cal. 379, 69 Pac. 23) did not involve the status of a party under a valid unannulled marriage, and hence are not in point. Nor do the other authorities cited apply under section 61 of the Civil Code.

Counsel for appellant attacks the sufficiency of the finding of the court that appellant, in good faith, believing Harrington to be dead, contracted the second marriage with Carley, and

contends that the evidence shows directly the contrary. If this claim of appellant were true, the marriage to Carley would be absolutely void, as not coming within the exception of section 61, and the making of this point is some suggestion that the utmost confidence is not placed by counsel upon the other point in the case. And if this claim were true, while it would entitle her to the homestead, it would remove the beneficent provision of section 61 from her daughter by Carley and stigmatize her as illegitimate. Her legitimacy is only protected on the theory that appellant's marriage with Carley was made in good faith. We do not, however, think that there is any merit in the assertion. The only testimony in the case was appellant's deposition; so there cannot be much room for dispute over what the evidence is, and on examination there is nothing in it militating against the finding of the court. [249] Counsel's principal claim in this respect is, that it does not appear from the evidence that appellant previous to her marriage with Carley made any endeavor to ascertain the whereabouts of Harrington. This she was not required to do. It was the duty of the latter to keep her advised of his whereabouts, and she had a right to believe, as she testified she did, from silence for ten years, that he was dead: Jones v. Zoller, 39 N. Y. 285. We are satisfied, under the principles of law above announced, that until the marriage of the appellant with Carley is annulled by a competent tribunal it must be deemed, under the provisions of section 61, to be a valid subsisting marriage, and as such appellant is the wife of Carley, and as a consequence the lower court was warranted in holding that she was not the widow of Harrington, and hence not entitled to a homestead.

The order of the lower court is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed an opinion, which is reported in 140 Cal. 295, 74 Pac. 136, in connection with the opinion in Estate of Harrington, S. F. No. 3200, decided September 22, 1903.

In the Estate of Harrington, 140 Cal. 294, 74 Pac. 136, the court affirmed an order refusing an application for a family allowance from the estate of the decedent on the authority of the principal case. In both cases a petition for a hearing in Bank was denied.

From the order of denial Chief Justice Beatty dissented, and in his dissenting opinion said:

"The case here differs from that presented in Estate of Newman, 124 Cal. 688, 57 Pac. 686, in one main particular. There the wife was guilty of bigamy and adultery, but was accorded all the rights of a widow in the estate of the husband she had deserted and betrayed, and that after she had claimed and received a widow's share out of the estate of her bigamous husband. Here a wife who had been deserted for many years, honestly believing that her husband was dead, contracted a second marriage. She was—so the opinion of the court assumes—legally and morally innocent. When she heard that her husband was living, her second husband left her and has disappeared. She has received nothing from him, and because she is innocent she is denied any of the rights of a widow in the estate of her husband. Our law, in other words, as construed by the court, punishes the innocent and rewards the guilty. The argument by which the result is reached, as I understand it, is this: No woman can have two husbands; Mrs. Newman's second marriage was void because she knew her husband was living, and, being void, had no effect upon her first marriage. Mrs. Harrington having good reason to believe her husband dead, her second marriage is not void, but only voidable, and remains valid until its nullity is adjudged by a competent tribunal; therefore, no such decree having been rendered, she was not the wife of Harrington when he died, and is not now his widow. This sounds like logic, but the soundness of any argument ought to be doubted when it leads to an absurd result; and the flaw in this reasoning, I think, consists in attributing too large a meaning to the word 'valid' as used in the statute. It is clearly within legitimate rules of construction to give that word a qualified meaning, and to hold that it does not validate the second marriage for all purposes, but only for the purpose of remedying those evils which the legislature had in view.

"I conceive that the only object of the legislature in the enactment of our statute was to secure to the children of such marriages the status and rights of legitimacy, and to the spouses their vested property rights as they should exist at the date of the discovery that the former husband or wife is still living. I do not understand that the legislature intended, and, I think, we should be far from assuming—as seems to be assumed in the opinion of the court—that a doubly wedded wife, in the situation of Mrs. Harrington, can make her election between her two husbands, and keep the second by neglecting to have the marriage annulled, or get back the former by obtaining such a decree. I think the law intends that on the discovery that her first husband is living she shall cease to cohabit with either until by a decree of divorce the first, or by a decree of nullity the second, marriage is dissolved. In the meantime, however, there is nothing in the letter or policy of the statute to deprive her

of her property rights in the estate of her first husband in case of his death, or of any vested right she may have as against her second husband."

The Validity of a Marriage contracted by an abandoned spouse is discussed in the monographic note to State v. Lowell, 79 Am. St. Rep. 374. As to the presumption in favor of the validity of second marriages, see the monographic note to Pittinger v. Pittinger, 89 Am. St. Rep. 198-206.

Property Rights Growing Out of a Void Marriage are discussed in the monographic notes to Deeds v. Strode, 96 Am. St. Rep. 267, 277; Werner v. Werner, 68 Am. St. Rep. 375-379.

HOOPER v. YOUNG.

[140 Cal. 274, 74 Pac. 140.]

PUBLIC LANDS—Patents, Presumption in Favor of.—On the production of a patent regular on its face, the presumption arises that it is valid and passed the legal title. It is of itself prima facie evidence that the steps required by law for its issuance had been regularly taken before it was issued. (p. 59.)

MORTGAGE—Conveyance by Mortgagee, Effect of.—If a deed absolute in form is in fact a mortgage, a conveyance by the mortgagee passes to the grantee all the former's right, title, and interest. (p. 61.)

MORTGAGEE IN POSSESSION—Presumption in Favor of.—If a mortgagee of real property is in possession, his possession will be presumed to be rightful, and, therefore, to have been taken with the consent of the mortgagor after a breach of the condition of the mortgage. (p. 61.)

MORTGAGEE IN POSSESSION—Ejectment Against.—When a mortgagee has taken possession by the consent of the mortgagor after a breach of the condition of the mortgage, he cannot maintain an action to recover possession until the debt is paid. (p. 61.)

Haskell & Denny and Fox & Gray, for the appellants.

Freeman & Bates and T. M. Osmont, for the respondents.

275 LORIGAN, J. Ejectment to recover a tract of about forty acres of land within the city and county of San Francisco. Plaintiffs recovered judgment, and from said judgment, as well as from an order denying their motion for a new trial, defendants appeal.

The land in controversy is part of the five hundred thousand acres granted to the state for school purposes, under the act of Congress of 1841, for which the state of California issued two patents, the first to P. L. Weaver, dated February 21, 1874; the second to Richard Wagner, dated January 24, 1881, both patents being recorded immediately after their respective dates.

Plaintiffs deraign title through the Wagner patent and by various mesne conveyances thereunder, which vested in them whatever title Wagner acquired under his patent.

Independent of this regular deraignment of title under said patent, plaintiffs introduced in evidence, for the purpose of connecting themselves with the elder Weaver patent, a quitclaim deed made to them by one J. W. Shanklin in 1894. It was admitted that the defendants were at the time, and 276 prior to the commencement of this action, in possession of the property. With this showing plaintiffs rested their case.

The defendants claim solely under the Weaver patent, and to maintain their title thereunder introduced in evidence, besides that instrument, a certificate of purchase issued by the register of the state land office in favor of said Weaver, dated August 3, 1872, in the usual form, and containing the usual recitals of payment for the land, compliance with the law regarding its purchase, and of his right to a patent on surrender of the certificate. This was followed up by a deed of grant, bargain, and sale from said Weaver to James W. Shanklin, dated October 12, 1872, a similar deed from Shanklin to W. B. Swain for an express consideration of fifteen hundred dollars, dated January 14, 1873, together with a deed of gift from said Swain to defendant Amelia G. Webber, his daughter, dated December 22, 1892, all of which conveyances were of the lands in controversy.

In addition, defendants offered in evidence certified copies of records in the office of the surveyor general of the state of California, showing, among other things, a certificate therein from the register of the United States land office that a notice of selection of the lands in controversy, together with other lands, had been made by the state of California in 1864, at which date the lands had been surveyed by authority of the United States; that at the date of the register's certificate (April 18, 1872) there was no evidence in his office that any pre-emption, homestead, or other right had attached to the land, and that the official plat of survey of the township in which the lands were located had been on file in that office for "more than three months." Also, that an application for location under the state, dated December 20, 1871, and entitled "Location No. 93, amending No. 14," was filed by said Weaver for the land in dispute, which application showed that he had already surrendered to the state a school land warrant for three hundred and twenty acres of land under an application of which this was amendatory; also, a certifi-

cate that said application was accepted by the surveyor general, and a further certificate by said surveyor general, dated August 3, 1872, that he had located three hundred and twenty acres of land (which included the lands in dispute), at the [277] request and for the use of said Weaver. Upon this showing defendants rested their case. It will be observed that the defendant Young does not seem to be in any wise connected with the record title to the property, and is probably simply a party in possession.

In rebuttal the plaintiffs then offered, and the court allowed, in evidence, over defendants' objections, two instruments executed by William B. Swain, grantee under the deed from Shanklin. They were both contracts made by Swain with one W. Meeks, in which the former, in consideration of certain payments to be made by Meeks, agreed to convey him the premises in controversy. In the first contract, dated January 14, 1873, Swain agreed to convey the land "according to a certain conveyance made to me this day by James W. Shanklin, which said conveyance was made to secure the payment to me of the sum of seven hundred dollars and interest from date." In the second, dated July 2, 1877, which appears to have been a renewal of the first, Swain agreed, on payment of a given amount, to convey the land "according to certain conveyance made to me on the fourteenth day of January, 1873, which said conveyance was made to secure the payment to me of the sum of . . . . dollars, and interest added to date would make the sum of one thousand and seventy-five dollars and fifty cents, as above mentioned." The last instrument alone seems to have been recorded, and this was done March 2, 1894.

This constituted all the evidence—which was entirely documentary—introduced on the trial.

Appellants challenge, among others, the finding of the court that plaintiffs were at the commencement of this action entitled to the possession of the property in dispute, and contend, in addition, that the court erred in admitting in evidence the instruments purported to have been executed by Swain; and we think both points are well made.

On this appeal each party assails the validity of the patent under which the other claims; in fact, the plaintiffs, although claiming not only under the Wagner patent, but through the Shanklin deed under the Weaver patent, even question the validity of the latter.

We are unable to discover that the evidence discloses any invalidity in the Weaver patent. It is regular on its face, and antedates the patent to Wagner almost seven years.

278 The rule is so well established as hardly to need mention that upon the production of a patent regular on its face the presumption arises that it is valid and passed the legal title, and is of itself further prima facie evidence that all the steps prescribed by law for its proper issuance had been regularly taken before the title was perfected through the patent: Heinlen v. Heilbron, 97 Cal. 105, 31 Pac. 838; Marshall v. Farmers' Bank of Fresno, 115 Cal. 335, 42 Pac. 418, 47 Pac. 52.

Plaintiffs contend, however, that this presumption is overcome by the records from the surveyor general's office which the defendants offered in connection with their proofs of title, and claim that it appears therefrom that at the time the application of Weaver was filed, the lands had not become subject to sale by the state, because there was no approval or filing of the official plat. If this point was of any moment (Roberts v. Columbet, 63 Cal. 22), there is nothing to show that the official plat was not on file when Weaver's amendatory location was filed. The certificate of the register, dated April 18, 1872, (Weaver's amendatory application was filed as early as December 20, 1871), state that the plat had been on file in his office "more than three months." How long before does not appear. Weaver's amendatory application had been on file less than four months when the certificate was made; and if it was legally essential that the plat should have been on file before the officers were warranted in making the location or issuing the patent, it is to be presumed that their official duty in this was regularly discharged (Watkins v. Lynch, 71 Cal. 24, 11 Pac. 808), and the issuance of the patent was additional evidence confirmatory of the presumption: Heinlen v. Heilbron, 97 Cal. 105, 31 Pac. 838; Marshall v. Farmers' Bank of Fresno, 115 Cal. 335, 42 Pac. 418, 47 Pac. 52. Aside from these considerations, however, it does not appear that the proceedings produced by defendants were all the proceedings in the land office pertaining to Weaver's application, and, from the filing of the amendatory location by him, it is apparent they were not. It is at least to be assumed from the contents of his amendatory location that some initiatory proceedings were taken by him prior thereto. How long before or under what act of the legislature providing for the sale of these lands is not ap-

parent. His original application may have been made under [279] any of the various acts of the legislature from 1852 to 1868, and under the saving clause of the latter (Stats. 1867-68, c. 528) he would be entitled to a patent. But it did not devolve on defendants to show these things. Claiming under the elder patent, they were protected by the prima facie regularity of its issuance, with the attendant presumption of equal regularity in all preliminary proceedings in that regard, and why they made proof of them as far as they did is difficult to understand. Their case did not seem to require it. It was incumbent on the plaintiffs, who were assailing the patent, if they wished to overcome these presumptions, to show that some of the necessary preliminary proceedings to its issuance were not taken, and so make it appear that it was issued without authority or contrary to law: Collins v. Bartlett, 44 Cal. 383; Watkins v. Lynch, 71 Cal. 24, 11 Pac. 808; Leviston v. Ryan, 75 Cal. 297, 17 Pac. 239. No such showing was made, and in its absence the presumption of regularity is not disturbed, and hence, as the patent to Weaver was valid, it conveyed to him all the right of the state to this land, and it necessarily follows that the subsequent patent to Wagner by the state was void, and plaintiffs obtained no title to the premises under it.

But, as stated above, in addition to their claim of title under the Wagner patent, plaintiffs claim title under the Weaver patent, through the deed from Shanklin, which deed was made over twenty-one years after his prior deed to the defendant's grantor, Swain.

The theory of plaintiff, as far as this deed to them is concerned, is, that Shanklin's deed to Swain, while on its face an absolute conveyance of this land, was in fact a mortgage, and it was upon this theory that the court permitted the introduction of evidence of the agreements between Swain and Meeks as tending to show such fact. But this very position of the plaintiffs relative to their claim under Shanklin's deed, taken in connection with the pleadings, admission of possession, and presumptions from the evidence, precludes them from raising this question in an action of ejectment. As they acquired no title under the Wagner patent, their sole claim of right to possession of the premises is under the Shanklin deed, and their sole claim under it is as successor to Shanklin's interest as mortgagor under the alleged mortgage to [280] Swain. Whatever the true character of the conveyance made by Shanklin to Swain was, the defendant Webber, through

her conveyance from the latter, succeeded to all his right and interest. If such conveyance was in fact a mortgage, she succeeded to Swain's rights as mortgagee. It is conceded in the case that at and prior to the commencement of this action the defendant Webber was in possession of the premises, and while it is true that the execution of a deed, absolute in form, but in fact a mortgage, does not warrant the grantee or mortgagee in taking possession of the mortgaged premises, still the mortgagee may agree or assent to such occupation. No presumption will be indulged in that one in possession of property is unlawfully or wrongfully there. On the contrary, the presumption is, that such possession is right and lawful. This presumption, in the absence of any showing to the contrary, must be indulged in here. Assuming the Shanklin deed to Swain to have been a mortgage, as contended for by plaintiffs (which, of course, we are not called on to determine, and do not), still, as the defendant Webber succeeded to Swain's rights as mortgagee, and is in possession, it must be presumed that she took such possession with the assent of the mortgagor, after breach of the conditions of the mortgage. When possession is so held by the mortgagee, the law is clearly settled that an action in ejectment cannot be maintained by the mortgagor to recover the possession until the debt is paid, and there is no pretense that this has been done in the case at bar: Frink v. Le Roy, 49 Cal. 322; Spect v. Spect, 88 Cal. 444, 22 Am. St. Rep. 314, 26 Pac. 203; Peshine v. Ord, 119 Cal. 314, 63 Am. St. Rep. 131, 51 Pac. 536.

We do not discuss the sufficiency of the evidence introduced by plaintiffs to support their contention that the Shanklin deed to Swain was a mortgage, because it is not pertinent to a disposition of the case, and in an action brought to redeem the question whether the deed to Swain was or was not a mortgage will be a vital question, upon which either additional or different evidence may be introduced.

We simply decide (1) that plaintiffs acquired no title under the patent to Wagner, as it was void, because a valid patent had previously been issued to Weaver by the state; and (2) that as the admissions and presumptions in the case, [281] even on plaintiff's theory that the deed to Swain was a mortgage, show that the defendant Webber, as successor to all the rights of Swain, is in possession of the premises as mortgagee, the finding of the court that the plaintiffs were entitled to the

possession of said premises is not sustained, but is contrary to the evidence.

The judgment and order appealed from are reversed and the cause remanded.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Shaw, J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 17th of October, 1903:

SHAW, J. I dissent from the denial of the petition for rehearing in this case. The decision of the court is based on the proposition that the defendant Webber, by virtue of a deed executed to her by her father, W. B. Swain, succeeded to all the rights of Swain as mortgagee of the land. There was no evidence of a transfer to Webber of the mortgage debt. The court says: "Whatever the true character of the conveyance made by Shanklin to Swain was, the defendant Webber, through her conveyance from the latter, succeeded to all his right and interest. If such conveyance was in fact a mortgage, she succeeded to Swain's rights as mortgagee." And this would be a correct statement of the law if it were true that a conveyance of the mortgaged land by the mortgagee transferred to the grantee both the mortgagee's title or right to the land and his interest in the debt secured thereby. The authorities, however, are precisely to the contrary of this. A deed by the mortgagee of the mortgaged premises not accompanied by the transfer of the debt to the grantee is a nullity: Dutton v. Warschauer, 21 Cal. 623, 82 Am. Dec. 765. Also, it has been held that an attempt to assign a mortgage, without a transfer of the security, is without effect: Hyde v. Mangan, 88 Cal. 320, 327, 26 Pac. 180; Polhemus v. Trainer, 30 Cal. 685. And a conveyance of the mortgaged premises does not operate as an assignment [282] of the mortgage, nor of the mortgage debt: Peters v. Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134. It follows from these authorities that the deed of gift executed by the mortgagee, Swain, to the defendant Webber was without any effect whatever, and did not transfer to the defendant Webber any right of possession which Swain may have held by virtue of his position as mortgagee. It is proper to state that the authorities above cited were not brought to the

attention of this court until the filing of the petition for rehearing.

Beatty, C. J., being disqualified, did not participate.

The Principal Case Appears to be Important, first, in affirming that a conveyance by a mortgagee passes to his grantee all his rights, including the debt to secure which the mortgage was given, and second, in affirming that when a mortgagee of real property is found in possession thereof after condition broken, it will be presumed that he took such possession with the consent of the mortgagor, and therefore that it is rightful and cannot be disturbed by the latter in an action of ejectment. So far as the first proposition is concerned, we apprehend that it was stated inadvertently, and that it cannot be regarded as law either in the state where announced, or elsewhere. This sufficiently appears from the opinion of Judge Shaw in dissenting from the order denying a hearing in bank. The second proposition, while affirmed by the court with implicit confidence, is, so far as we can ascertain, entirely unsupported by authority. Upon principle, however, we are not prepared to affirm that it is not maintainable. At all events, the decision to this effect constitutes, we believe, a new contribution to the law upon the subject.

A Patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, is prima facie valid in an action at law: Johnson v. Drew, 34 Fla. 130, 43 Am. St. Rep. 172, 15 South. 780. See, too, Phillips v. Carter, 135 Cal. 604, 67 Pac. 1031, 87 Am. St. Rep. 152, and cases cited in the cross-reference note thereto.

While the Mortgage debt remains unpaid, ejectment will not lie against a mortgagee in possession: Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; Speck v. Speck, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203; note to Cotton v. Carlisle, 7 Am. St. Rep. 33. Compare, Bowen v. Brogan, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942.

MILLER v. CHRISMAN.

[140 Cal. 440, 73 Pac. 1083, 74 Pac. 440.]

OIL LANDS.—A Location of Oil Lands is Invalid if the locator had at the time made no discovery of mineral on the land. (p. 66.)

OIL LANDS.—An Invalid Location of Oil Lands leaves them open to notorious, peaceable, and bona fide entry by others for the purpose of initiating a new location. (pp. 66, 67.)

OIL LANDS.—The Location of Oil Lands is Governed by the mineral laws of the United States, applicable to the location of placer mining claims. (p. 66.)

OIL LANDS.—To the Location of Oil Lands, Two Requirements are Essential: There must be a distinct marking of the location

so that boundaries can be readily traced, and the discovery of mineral must be made within the limits of the land located. (p. 66.)

OIL LANDS.—Discovery, When not Sufficient to Support Location.—One who walks over and posts a notice of location upon lands showing indication of petroleum, such as a spring in which oil comes up and floats over the water in the summer-time when it is hot, and whence the water with a little oil drips over a rock, has not made a discovery sufficient to support a location. (p. 66.)

OIL LANDS—Second Location, Abandonment of First, When not Necessary to.—If a location of an oil claim is not valid, its abandonment is not necessary to the making of a subsequent location. (p. 66.)

OIL LANDS—Location Previous to Discovery.—It is not necessary that a discovery precede or coexist with the posting of notices and the making of the claim. A discovery subsequently made perfects the title, except in so far as the rights of others may have been intervened. (p. 68.)

OIL LANDS—A Location Made by an Association of Persons is One Location, though covering one hundred and sixty acres, and not eight locations covering twenty acres each, and but one discovery and one doing of assessment work are necessary for the whole tract. (p. 69.)

OIL LANDS—Conveyance Before Discovery.—Where a location is made by associates they may convey to one of their number before the location is perfected by discovery, and their conveyance does not result in an abandonment of their claim, nor in the destruction of the location, or any part of it. (p. 71.)

W. R. McQuiddy, Austin & Jones, George W. Jones, Reddy, Campbell & Metson, and Campbell, Metson & Campbell, for the appellants.

J. W. McKinley, J. H. Call and Charles H. McFarland, amici curiae, for appellants on petition for rehearing.

E. O. Larkins, U. T. Clotfelter, W. S. Badger and Edward A. Meserve, for the intervener, appellant.

L. L. Cory, M. K. Harris, N. C. Colwell, and Frank H. Short, for the respondents.

C. Linkenback and R. H. Countryman, amici curiae, for the respondents.

444 HENSHAW, J. This action is to quiet title to the northeast quarter of section 20, township 19 south, range 15 east, Mount Diablo base and meridian, in the county of Fresno, state of California. All parties claim by virtue of locations made under the mineral laws of the United States.

It is admitted that in the year 1895 the land in controversy was a part of the public domain of the United States, and open to exploration under its mineral laws. Upon the four-

tenth day of June, 1895, one A. Barieau, on behalf of himself and seven others, as associates, went upon the land and posted a location notice. Nothing further was done until the month of January following, when Barieau entered upon the land with a surveyor and marked the boundaries of the location upon the ground. Upon the twenty-fourth day of December, 1896, the interests of Barieau's seven associates passed to E. O. Miller, plaintiff herein, by mesne conveyance. Thereafter, on the 31st of December, 1896, Miller executed a purported abandonment and relinquishment of his right, title, and interest to the land in controversy to the United States, and on the same day made a location on behalf of himself and seven associates. Upon January 1, 1897, the defendants Chrisman made their location; while upon the twenty-second day of December, 1898, more than two months after the commencement of this action, and in the night-time, the intervener, with H. T. Chrisman, entered upon the land and made still another location covering a part of it. After trial the court found in favor of plaintiff's location, against the locations of defendants and the intervener, and judgment passed accordingly.

Defendants and intervener make common cause upon most of the matters presented upon appeal. Their contentions are:

1. That the location by Barieau and others upon the 14th of June, 1895, was a valid location, which devested the land of its status as part of the public domain, and appropriated it to private claim and dominion until the end of the year 1896.

2. That, therefore, Miller's attempted location upon December 31, 1896, was void, because made at a time when there was a valid subsisting location upon the land; because it was not based on a discovery, and was not perfected by a subsequent [445] discovery until the rights of other parties attached; because the location was in fact made only by Miller, Hall, and Hannah, the other five colocators being mere dummies; and, finally, because the boundaries of the location were not marked upon the ground so that they could be readily traced.

3. That no assessment work whatsoever having been done upon the land in question during the year 1896, by or on behalf of Barieau and his colocators, the Barieau location lapsed, and on the first day of January, 1897, the land again became open for exploration and location, and was so open at the time that defendants made their locations upon January

1, 1897; that their locations were, and at all times have been, valid subsisting locations.

It will thus be noted that none of the appellants claims under the Barieau location, nor contends that he has acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896, by failure to perform the statutory amount of labor. If, however, the Barieau location was an invalid location, as the court finds, then the lands were open to notorious, peaceable, and bona fide entry by others for the purpose of initiating a new location. The findings of the court, as has been said, were against the validity of the Barieau location. We are satisfied that it was invalid for at least one reason. Barieau and his colocators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land.

In considering this proposition, it should be said that the mineral upon these lands is oil. Under the act of Congress of 1897, the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims. The two requirements admittedly essential to the validity of a location such as this are, that the location must be distinctly marked upon the ground so that the boundaries can be readily traced, and that there must be a discovery of minerals within the limits of the land located: U. S. Rev. Stats., sec. 2324; U. S. Comp. Stats. 1901, p. 1426. Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts to no more than this, that Barieau had walked [446] over the land at the time he posted his notice and had discovered "indications" of petroleum. Specifically, he says that he saw a spring, and "the oil comes out and floats over the water in the summer-time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water." This is all of the "discovery" which it is even pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological forma-

tion of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery. This view finds support in the Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, where the circuit court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances. While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, occur. Nor does the view which we entertain of the essentials of a valid discovery as applied to oil-bearing lands present any points of hardship, but, to the contrary, we think it to be not alone the only rational one which may be taken under the law, but also the only interpretation which offers security and protection to the bona fide locator. It is to be remembered that it is not essential to the validity of a location that the discovery shall have preceded or shall coexist with the posting of the notice and the demarcation of boundaries. The discovery may be made subsequently, and when made operates [447] to perfect the location against all the world, saving those whose bona fide rights have intervened. One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must always be peaceable, open and above board, and made in good faith, or no right can be founded upon it: Belk v. Meagher, 104 U. S. 279; Atherton v. Fowler, 96 U. S. 513; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673.

It was just such a peaceable, open entry upon the land that Miller and his associates made upon December 31, 1896. No discovery had been made under the Barieau location. No work at all had been done to protect it, and in consequence it could not be said that Barieau and his associates were in

the actual bona fide possession of their claim and developing it under the requirements of the statute. This being the case, it was the right of any person or association of persons to enter peaceably and openly, as was done by Miller and his associates.

It thus having been determined that the initiation of the claim of Miller and his associates was founded in right, there remains to be considered the objections urged against the validity of that location. And, first, it is insisted that the location is invalid because Miller, prior to his location, but upon the same day, executed an abandonment to the government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made in good faith, but was designed as a fraud upon the United States, to evade the performance of the assessment work required by law. But the answer to this is, that the court upon sufficient evidence finds against this contention, and furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon. As to other objections made to the validity of the Miller location, it is sufficient to say without discussing the evidence, that the court was justified in its finding that the requirements of the posting of a sufficient notice and demarcation [448] of boundaries were all complied with in accordance with law. So, too, the evidence warrants the findings of the court that the persons named as colocators in the Miller location were bona fide locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion, and conspiracy upon the part of these locators.

It is disclosed by the evidence that Miller, his associates and lessees, remained in possession of the land, and with diligence and at a great expense prosecuted the work of boring wells. This work finally resulted in success; oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus not only made a discovery, but they are the only ones of all the alleged locators who have done so. It has been said that it is not necessary that discovery should precede nor coexist with the posting of notice and the marking of the claim, but that a discovery subsequently made perfects the title, except so far as the rights of others may have intervened. This proposition is perhaps too well recognized to require citation of authorities, but reference may be made to 1 Lindley on Mines

and Mining, sec. 330; Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. 666; North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Erwin v. Perego, 93 Fed. 608; Erhardt v. Boaro, 113 U. S. 527 5 Sup. Ct. Rep. 560; English v. Johnson, 17 Cal. 108, 76 Am. Dec. 574. The alleged discovery of defendants under their location may be disposed of in a sentence. It amounted to no more than the pretended discovery made by Barieau. It results, therefore, that between the date of the Miller location and the date of the Miller discovery no rights had intervened, and the possessory title of the holders under the Miller location was justly quieted against the adverse claimants.

It is against this, however, still further contended that, notwithstanding the fact that the location on behalf of Miller and his associates embraced one hundred and sixty acres in common, and notwithstanding the fact that they had driven successful wells upon the different parts of the land, yet, as at the time of the institution of the suit, they had not actually driven a well and discovered oil upon those portions of the quarter [449] section claimed by the defendants, plaintiff's claim of title is void as to each of those twenty acres upon which actual discovery has not been made. But a location made by an association of persons, by the very terms of the law, is one location covering one hundred and sixty acres, and not eight locations, each covering twenty acres. The boundaries required to be marked are the boundaries of the one hundred and sixty acres, and not the boundaries of each separate twenty acres. The expenditure of five hundred dollars before patent issues is an expenditure required upon the whole land, and not an expenditure upon the twenty acre subdivisions thereof, and the only assessment work required is labor to the value of one hundred dollars upon the single location, and not upon any twenty-acre subdivision thereof. Logically, therefore, since in marking boundaries, doing assessment work, and expenditure for patent the one hundred and sixty acres are treated as an entirety under one location, for the purpose of discovery it should be treated in the same manner, and this is the ruling, with some conflict in its earlier decisions, which the land office of the United States has finally returned to and settled upon. In the Case of Union Oil Co., 25 L. D. 351, it is explicitly declared: "A placer location, if made by an association of persons, may include as much as one hundred and sixty acres. It is nevertheless a single location,

and as such only a single discovery is by the statute required to support it." With this declaration we are in full accord.

The claim of the intervener scarcely merits even a passing notice. The record shows that his alleged location was made upon the twenty-second day of December, 1898, after the institution of this action, and long after the plaintiffs had sunk their wells and discovered oil. The intervener knew that at the time of his alleged discovery the Home Oil Company was in the occupancy of the territory. He entered upon the land and located his claim between the hours of 9 and 11 o'clock at night. He adopted for his boundaries the existing boundaries, and his discovery consisted in observing the oil which was coming from plaintiffs' well. Such a fraudulent, surreptitious and clandestine entry upon the possession of another cannot be made the basis of any right: Atherton v. Fowler, 96 U. S. 513.

450 It appears that Miller, his colocators, and other successors in interest remained in the actual and undisturbed possession of the entire property from the date of their location until the commencement of this action. It appears further that upon the thirty-first day of July, 1897, and before any discovery of oil had been made, Miller's associates and colocators executed to him a deed of all their right, title and interest in the property. Subsequently, and upon the seventeenth day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the plaintiff Home Oil Company. The Home Oil Company thereupon took possession of the premises, bored for, and in the month of October, 1897, struck oil and made the first discovery upon the land in question. Upon this state of facts intervener contends that the location was invalid; that the effect of the conveyance of his colocators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not, and could not, serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to relocate twenty acres about his discovery.

Stating the proposition in a sentence, it is this: Where a location has been made by associates, those associates have no right or title which they can convey before the location is perfected by discovery, and their attempt to convey results in an abandonment of their claim, and in the destruction of the

whole location. It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an undivided eighth interest in the whole. It further appears that certain valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (Garthe v. Hart, 73 Cal. 541, 15 Pac. 93), and they may defend this possession in the courts: Richardson v. McNulty, 24 Cal. 339. They have then this right of possession and with it the right to protect their possession against all illegal intrusions, and to work the land for the valuable minerals it is thought to contain. We cannot perceive [431] why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the expressed law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the colocators abandons his claim or interest, by refusing to bear his proportion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, but "his interest in the claim shall become the property of his co-owners who have made the required expenditures": U. S. Rev. Stats., sec. 2324; U. S. Comp. Stats. 1901, p. 1426. It is to be borne in mind that a location such as this, though it contains one hundred and sixty acres, is still a single location, a single claim, with undivided interests, covering the whole of it. Any work done upon the claim is done for the benefit of all the colocators. It is undisputed that when the location has once been perfected, one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates had stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend, in the face of section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole one hundred and sixty acres. If, then, by their abandonment, without a conveyance, Miller would have acquired

the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result.

For the foregoing reasons the judgment and order appealed from are affirmed.

McFarland, J., Van Dyke, J., Angellotti, J., and Lorigan, J., concurred.

[452] Rehearing denied October 31, 1903. Beatty, C. J., delivered the following dissenting opinion:

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. There can be no location of a mining claim before discovery, and there can be no transfer or assignment of a location before the location is complete. There can, in other words, be no assignment of the right to locate. If, in the expectation of discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, I have no doubt that they will be protected in their possession while they proceed with reasonable diligence to prospect the claim, and that by a discovery they will perfect it; but if some of the associates withdraw before discovery or attempt to assign their claims to those who continue the work of development, those who remain will have no right to a claim greater in the aggregate than they could have taken by an original location.

Laws Respecting the Location of Mining Claims are construed liberally: Farmington Gold Min. Co. v. Rhymney Gold etc. Co., 20 Utah, 913, 77 Am. St. Rep. 913, 58 Pac. 832. The boundaries of a claim, however, must be distinctly marked: White v. Lee, 78 Cal. 593, 12 Am. St. Rep. 115, 21 Pac. 363. As to what is a discovery of mineral, see McShane v. Kenkle, 18 Mont. 208, 56 Am. St. Rep. 579, 44 Pac. 979. The location of a mining claim can rest only upon an actual discovery of a vein or lode: Gemmell v. Swain, 28 Mont. 331, post, p. 570, 72 Pac. 662; but the fact that there is no discovery until after posting the notice and marking the boundaries is immaterial, in the absence of intervening rights: Cedar Canyon Con. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749; Brewster v. Shoemaker, 28 Colo. 176, 89 Am. St. Rep. 188, 63 Pac. 309. As to the essentials of discovery and marking off of claims when an association makes a location, see McDonald v. Montana Wood Co., 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668.

DEYOE v. SUPERIOR COURT.

[140 Cal. 476, 74 Pac. 28.]

CONSTITUTIONAL LAW—Special or Class Legislation, When Valid.—The legislature has the right to enact laws applicable to one class of citizens only, where the classification is authorized by the constitution and is based upon extrinsic differences requiring different legislation. (p. 76.)

CONSTITUTIONAL LAW—Differences in Rules of Procedure. A proceeding to dissolve the marriage relation is, by reason of the interest of the state, intrinsically different from an ordinary action, and that difference justifies, and in many cases necessitates, different rules of procedure. (p. 78.)

CONSTITUTIONAL LAW—Divorce Statute Prohibiting Entry of Final Decrees of Until After One Year from the Decision of the Court.—A statute providing that in suits for divorce, if the court finds a party entitled to a divorce. it shall enter an interlocutory judgment so declaring, but that final judgment shall not be entered until one year afterward, is constitutional, though the right to final judgment is not thus suspended in any other class of cases, and the constitution provides that the legislature shall not pass any local or special law regulating the practice in courts of justice. The intrinsic difference between suits for divorce and other cases justifies the enactment of special rules applicable to divorce suits only, and rules so enacted are not special legislation. (p. 80.)

CONSTITUTIONAL LAW—Title of Statute, Construction of. A constitutional provision requiring the subject of an act to be expressed in its title must be liberally construed, because the constitution itself does not define the degree of particularity required. (p. 83.)

CONSTITUTIONAL LAW—Title of Statutes, When Sufficiently Expresses Their Object.—The title "An act to add two new sections to the Civil Code, relating to actions for divorce," is sufficient to sustain provisions providing that when a party is entitled to a divorce, an interlocutory decree so declaring must first be entered, and that the final decree cannot be entered until one year afterward. (p. 84.)

CONSTITUTIONAL LAW—Legislation in the Wrong Code.—A statute adding two new sections to the Civil Code cannot be declared unconstitutional because they relate almost entirely to procedure, especially if the sections so added relate to divorce, and the Civil Code contains all the provisions of the law specially applicable to divorce and divorce cases. (p. 84.)

CONSTITUTIONAL LAW—Statutes, When must not be Declared Unconstitutional.—An act of the legislature should not be declared unconstitutional unless it is clearly apparent that the act is in violation of some constitutional provision. (p. 84.)

Mannon & Mannon, for the petitioner.

H. S. G. McCartney, Camp & Lissner, J. W. McKinley and William J. Hunsaker, as amici curiae, for the respondent.

478 ANGELLOTTI, J. Petitioner applied to this court for a writ of mandate, requiring respondent, the superior court of 479 Mendocino county, to enter a final judgment of divorce in an action pending in said court, in which petitioner is plaintiff, and his wife, Annie I. Deyoe, is defendant. An alternative writ was issued, and the matter submitted for decision upon the petition and argument of counsel.

The action for divorce was instituted by petitioner on April 10, 1903, and the divorce was asked on the ground of desertion. The defendant therein, having been served with summons, as appears from the return of the sheriff of Riverside county, failed to appear, and her default was entered. Testimony was then taken, and on June 22, 1903, the superior court made and caused to be filed its findings of fact and conclusions of law, constituting its decision, whereby it found that all of the allegations of the complaint are true, and that plaintiff, petitioner here, is entitled to a divorce from said defendant. The petitioner asked that final judgment in his favor be thereupon entered, but the court refused to make any order for a final decree, and ordered an interlocutory decree entered. On June 29, 1903, the judge of said court signed, and the clerk entered, the so-called interlocutory decree, whereby it was ordered, adjudged and decreed "that the said plaintiff, Frank C. Deyoe, is entitled to a divorce from his said wife, the defendant, Annie I. Deyoe." The clerk of the said court has refused, on demand made, to enter any other judgment.

Admittedly, the action of the superior court was in strict accord with the provisions of an act of the legislature of the state, relating to actions for divorce, approved March 2, 1903 (Stats. 1903, p. 75). It is, however, claimed by petitioner that said act of the legislature is unconstitutional; that consequently, the superior court having rendered its decision in favor of petitioner, it is the duty of that court to enter final judgment in accordance with that decision, and that mandamus will lie to compel the performance of that duty. The act in question (Stats. 1903, p. 75) is as follows, viz.:

"An act to amend the Civil Code by adding two new sections thereto, to be numbered one hundred and thirty-one and one hundred and thirty-two, to title one, of part one, chapter two, article three, relating to actions for divorce. (Approved March 2, 1903.)

"The people of the state of California, represented in senate and assembly, do enact as follows:

480 "Section 1. The Civil Code of California is hereby amended by adding two new sections to title one, part one, chapter two, article three, to be numbered sections one hundred thirty-one and one hundred thirty-two, to read as follows:

"131. In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final.

"132. When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

"Sec. 2. All acts or parts of acts in conflict with the provisions of this act are hereby repealed."

Petitioner contends that this act is a special law, regulating the practice of courts of justice, and therefore repugnant to the provisions of subdivision 3 of section 25 of article 4 of the constitution. It is there provided that "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, ... Regulating the practice of courts of justice."

481 That the act does attempt to regulate the practice of courts of justice in relation to a special class of cases is undeniable. Ordinarily, a party in whose favor a case has been de-

cided is entitled to have final judgment entered (Code Civ. Proc., secs. 633, 654), while the effect of the act in question is to postpone the entry of final judgment granting a divorce for one year, and if any appeal has been taken from the so-called interlocutory judgment or decision, or motion for new trial made, until the determination of the same. But the mere fact that it operates only on one class of cases does not make it repugnant to the constitutional provision. Our statutes contain many provisions regulating the practice of courts of justice, applicable only to certain classes of actions or special proceedings, made necessary by the nature of the objects and purposes of the various classes. The legislature has the right to enact laws applicable only to one class of its citizens where the classification is authorized by the constitution, or is based upon intrinsic differences requiring different legislation. The law in this regard was well stated by this court, through Mr. Justice Harrison, in People v. Central Pacific R. R. Co., 105 Cal. 576, 584, 38 Pac. 905, where it was said: "A law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be 'founded on some natural or intrinsic or constitutional distinction' (Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604), but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class": See, also, Rode v. Siebe, 119 Cal. 518, 51 Pac. 869. The classification must not be arbitrary, for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction which will suggest a reason which might rationally be held to justify the diversity in the legislation: Pasadena v. Stimson, 91 Cal. 238, 251, 27 Pac. 604; Darcy v. Mayor etc., 104 Cal. 642, 38 Pac. 500.

If the individuals to whom the legislation is applicable constitute [482] a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is

not violative of our constitutional provisions against special legislation. This we do not understand to be seriously disputed by those who assail the act in question. But it is strenuously urged that there is no such distinction between the class of actions to which this law is made applicable—i. e., all actions wherein it is determined that a marriage should be dissolved—and other actions as will justify the legislature in prescribing a different rule as to entry of final judgment from that applicable in ordinary cases. In this contention we cannot concur. In every civilized country marriage is recognized as the most important relation in life, and one in which the state is vitally interested. The right of the legislative department to determine upon what conditions and in what manner the marriage relation may be entered into, and, having been entered into, for what causes and in what manner it may be dissolved, is unquestioned. The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation and illicit unions: See 1 Nelson on Divorce and Separation, sec. 1. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case, except upon full and satisfactory proof of such facts as have been by the legislature declared to be a cause for divorce. Such provisions find their justification only in this well-recognized interest of the state in the permanency of the marriage relation. While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and the wife and the state are parties. It was said by this court in McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61, [483] in reversing the order of the court below refusing to set aside a default: "The courts should be very liberal in granting applications to set aside defaults in divorce cases. . . . . The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud, and it

should be the aim of the court to afford the fullest possible hearing in such matters": See, also, Warner v. Warner, 100 Cal. 11, 14, 34 Pac. 523; Hatton v. Hatton, 136 Cal. 353, 356, 68 Pac. 1016; Newman v. Freitas, 129 Cal. 283, 289, 61 Pac. 907.

It has long been the law of this state that a divorce shall not be granted upon the default of the defendant, or upon the uncorroborated evidence of the parties (Civ. Code, sec. 130), and that a divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought for three months next preceding the commencement of the action: Civ. Code, sec. 128. In discussing this provision of our divorce law, this court said in Warner v. Warner, 100 Cal. 11, 34 Pac. 523: "The state has an interest in the result of such cases. The public welfare demands that the bonds of matrimony should not be lightly set aside, and there is less probability of successful collusion or unfair advantage where the parties have both resided and are known than there is in a county where neither has resided, and which the plaintiff may select solely for the purpose of procuring a divorce." The provisions above referred to and others contained in our Civil Code, applicable only to divorce cases, can, as already stated, be sustained only on the theory of the interest of the state in the maintenance of the marriage relation. We presume that no one would question their validity, even though some of them do regulate the practice of courts of justice in divorce cases.

It is evident that a proceeding to dissolve the marriage relation is, by reason of the interest of the state, intrinsically different from the ordinary action, and that the difference is such as not only to justify, but in many cases to necessitate special rules of procedure. As has been said, a suit for divorce is sui generis. If the action were the ordinary action between two parties who alone were interested in the result, it might [484] be difficult to give any good reason for a special rule as to the giving of final judgment, or indeed for any of the provisions specially applicable to divorce cases, already referred to. But this interest of the state is sufficient to distinguish it from all other cases, and to make it one concerning which the legislature is authorized to enact such laws of procedure as may rationally be held to protect that interest. It might be contended with much force that an act of the legislature providing for the postponement of the giving of a final decree of divorce

for a specified time after the finding that a party was entitled thereto was fully justified by the fact that the parties might be reconciled during such time and a final separation thus obviated. We find in the statutes of some of the state provisions for a decree nisi in divorce cases, which decrees are made absolute only after the expiration of a specified number of years, if the parties have continued to live separate and apart. There would seem to be no question as to the right of a legislature to so regulate divorces: Bigelow v. Bigelow, 108 Mass. 40. Again, it might be contended with much force that such legislation was justified, upon the theory that the postponement of the giving of final judgment for a specified time removes to some extent the temptation to resort to collusion or fraud in order to obtain a speedy divorce and contract a new marriage. It is not, however, necessary to base our decision as to the constitutionality of the act in question upon either of these grounds. It is the settled law of this state that the effect of the rendition of a final judgment of divorce is to at once restore the parties to the state of unmarried persons, regardless of the fact that the judgment is appealable, and regardless of the fact that it may be set aside on motion. The divorced person becomes unmarried immediately upon the rendition of the decree, and may at once contract another marriage: See Estate of Wood, 137 Cal. 129, 130, 137, 69 Pac. 900, and cases there cited. The husband or wife so taken by the subsequently contracted marriage would, however, be taken, as said by the chief justice in Estate of Wood, 137 Cal. 129, 69 Pac. 900, "subject to the contingency of being displaced by the reversal of an appealable and possibly erroneous decree," which appeal might be taken within six months of the entry of the judgment. Within six months from the rendition of the judgment the trial court might relieve [485] the party against whom judgment was rendered from such judgment, on the ground of mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc., sec. 473), and thus displace the new husband or wife. As is well known, many divorce judgments are procured upon substituted service of summons, and, as was said by Mr. Justice Temple in Estate of Wood, 137 Cal. 129, 69 Pac. 900, "In such case the court may, and upon a proper showing should, allow the defendant to answer to the merits within one year after the rendition of the decree: Code Civ. Proc., sec. 473." Such permission would vacate

the decree and displace the husband or wife taken by the second marriage. As was said by Mr. Justice Temple in the case last cited, "Any civilized people would desire to avoid such possibilities." There can, of course, be no doubt of the right of the legislature to enact such laws as will guard against such possibilities. This was attempted by the legislature by the amendment of February 25, 1897, to section 61 of the Civil Code whereby it was provided that a subsequent marriage is void from its inception, unless "the former marriage has been annulled or dissolved; provided, that, in case it be dissolved, the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage." This amendment was, however, found to be inadequate, for it was held that it could not affect a marriage solemnized in a foreign jurisdiction, and it was also clear that it would not suspend the effect of the decree pending a decision on an appeal: Estate of Wood, 137 Cal. 129, 69 Pac. 900. The change made by the decree of divorce in the status of the parties and the existence of the possibilities already stated distinguish a decree of divorce from every other judgment known to our law, and fully justify the legislature in providing, because of the interest of the state, that no final decree of diverce shall be made until it shall have been finally and irrevocably determined that a divorce should be granted. This, in our judgment, the legislature has done by the act in question. It is urged that if this be the object of the act, it is not accomplished, as an appeal may still be taken from the subsequent final judgment, after the parties have been restored to the state of unmarried persons. There is no merit in this contention. Whether or not all the issues made by the pleadings in a divorce case must be [486] determined by the "interlocutory judgment," it is not necessary here to decide, but it is clear that the question as to whether a party is entitled to a divorce must be determined thereby. An appeal from that determination is given by the act, and such determination is thereby "taken out of the category of orders examinable upon appeal from the final judgment." In this respect, the intermediary judgment occupies, as to the matters properly embraced therein, the same position as an interlocutory decree in partition, and is not reviewable upon the appeal from the final judgment: Code Civ. Proc., sec. 956; McCortney v. Fortune, 42 Cal. 387; Regan v. McMahon, 43 Cal. 625; Barham v. Hostetter, 67 Cal. 272, 7 Pac.

689; Barry v. Barry, 56 Cal. 10; Gutierrez v. Hebbard, 106 Cal. 167, 39 Pac. 529.

It is further urged that there is no sound reason why the law should apply only to those actions for divorce in which it is found that a party is entitled to a divorce. The answer to this is to be found in what has already been said as to the peculiar nature and effect of a decree awarding a divorce. The distinction in this regard between such a decree and one denying a divorce is too obvious to merit discussion.

Much reliance is placed by petitioner upon the decision of this court in Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047, wherein it was held that a certain provision of an act supplemental to the act generally known as the Wright act (Stats. 1889, p. 212), providing for the judicial examination, approval, and confirmation of proceedings for the issue and sale of bonds issued under the provisions of the Wright act, was in violation of the provision of the constitution against local or special laws regulating the practice of courts of justice. The provision there held violative of that portion of the constitution was one to the effect that a motion for a new trial could be made only on the minutes of the court. The effect of this provision was not only to deny the right to move for a new trial on a statement of the case or a bill of exceptions, as permitted in all other cases, but also to preclude a motion for a new trial on any of four grounds upon which a motion could be made only on affidavits. It was said by the court that this provided for a limited species of judicial proceedings, a mode of moving for a new trial materially different from that provided by the general law relative to new trials, "without any reason or [487] necessity for the difference arising from any peculiar characteristic of the class of proceedings to which it is applied, nor from any other source." It is possible that a similar provision applicable to divorce cases would be invalid for the same reason, for it would be difficult to conceive of any reason why a party to such an action should be restricted in the rights given other litigants to move for a new trial upon certain grounds and in a certain manner. But, as we have already attempted to show, the nature and effect of a decree of divorce are such as to justify the special method as to the time and manner of giving final judgment of divorce provided for by this act. We find nothing in the opinion in Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047, that is contrary

to what has been said herein. Our conclusion is, that the act in question is not violative of the provision of our constitution prohibiting the enactment of local or special laws regulating the practice of courts of justice.

What has been said disposes of the objection that the act is violative of subdivision 33 of section 25 of article 4, which prohibits the enactment of a special law, "in all other cases where a general law can be made applicable," and of the objection that it interferes with the uniform operation of a general law—to wit, section 633 of the Code of Civil Procedure—providing for the entry of judgment in ordinary cases, and hence is repugnant to section 11 of article 1 of the constitution, which provides that all laws of a general nature shall have a uniform operation. As was said in Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057: "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one."

It is further claimed that the provisions of the act relative to the entry of an interlocutory judgment instead of a final judgment are not embraced within the subject expressed in the title, and are consequently void under section 24 of article 4 of the constitution, which provides as follows, viz.: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." The title of the act, as already [488] stated, is, "An act to amend the Civil Code by adding two new sections thereto, to be numbered one hundred and thirty-one and one hundred and thirty-two, to title one, of part one, chapter two, article three, relating to actions for divorce." The statement in the title that the purpose of the act is to "amend" the Civil Code may be disregarded, for it further clearly appears in the title that all that is intended thereby is the addition to said code of two new sections "relating to actions for divorce." The title, then, shows that the act is simply one to add two new sections to the Civil Code, to be numbered 131 and 132, "relating to actions for divorce." Such a title is sufficient to embrace every provision of the act, with the possible exception of the provision as to the effect of the final judgment on the status of the parties (which subject is fully covered by section 91 of the Civil Code), and the provision that the entry of final judgment shall not validate any

marriage contracted by either party before the entry, nor constitute any defense of any criminal proceeding made against either: See Civ. Code, sec. 61, as amended, Stats. 1903, p. 176. As to whether or not these provisions can be held to be included in the title of the act in question is not important or necessary to here decide, for the determination of that question can in no way impair the validity of the remaining provisions. All of the other provisions of the act clearly relate to actions for divorce, and are therefore embraced within the subject expressed in the title. The only question that could arise in this connection is as to whether the words "relating to actions for divorce" state the subject with a sufficient degree of particularity. The constitutional provision requiring the subject of an act to be expressed in the title has always been liberally construed, and this court has said that this must be so, because the constitution itself does not define the degree of particularity required, and the matter must therefore be left largely to judicial discretion. It has been said by this court that if the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain (Ex parte Liddell, 93 Cal. 633, 638, 29 Pac. 251); that it is not required that the title shall disclose the purpose and scope of the act, but it is sufficient if it intelligently refers the reader to the subject to which the act applies, or which is affected by it (Hellman v. [489] Shoulters, 114 Cal. 136, 150, 44 Pac. 915, 45 Pac. 1057); and that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents: People v. Linda Vista District, 128 Cal. 477, 485, 61 Pac. 86. It was said in Carpenter v. Furrey, 128 Cal. 665, 668, 61 Pac. 369, that the subject of an act adding a new section providing for the filing of a bond for the benefit of laborers, materialmen, and subcontractors, and for a penalty in case the bond was not filed as required, was sufficiently expressed in the following title, viz.: "An act to add a new section to the Code of Civil Procedure of the state of California, to be numbered section 1203, relating to liens of mechanics and others." Under the construction given our constitutional provision, it cannot be held that the title does not state the subject of the act with a sufficient degree of particularity.

Some reliance seems to be placed by petitioner upon the fact that this act, relating almost entirely to procedure in divorce cases, has been placed in the Civil Code instead of the Code of Civil Procedure. We cannot see how this in any way

affects the validity of the act. As was said in Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257, and note. "Nearly all of our general laws are arranged for convenience, under four main headings, to wit, the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code, but no one of these four codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code": See, also, Enos v. Snyder, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170.

The Civil Code was, however, the appropriate place for the legislation in question, notwithstanding such legislation relates to procedure, for that code has always contained all provisions of law specially applicable to divorces and divorce cases, including such special rules relating to procedure therein as have from time to time been deemed essential by the legislature.

It is urged that instead of amending the Civil Code, as stated in the title, the act in fact amends three separate codes—the Code of Civil Procedure, the Civil Code, and the Penal Code. As already intimated, the act, as shown by the [490] title, was not an act to "amend" any code, but was simply an act to add two new sections to the Civil Code, "relating to actions for divorce." If it amends any law, it does so only by implication, and is in no proper sense of the word an amendment: See Hellman v. Shoulters, 114 Cal. 136, 151, 44 Pac. 915, 45 Pac. 1057.

An act of the legislature should not be declared unconstitutional by the courts unless it is clearly apparent that the act is violative of some provision of the constitution. Where there is a reasonable doubt as to the validity of the act, its constitutionality should be affirmed. "A just deference for the legislative department enjoins upon the courts the duty to respect its will, unless the act declaring it be clearly inconsistent with the fundamental law, which all members of the several departments of the government are sworn to obey": People v. Judge of Twelfth District, 17 Cal. 547. We see no constitutional objection to the act in question.

The application for a peremptory writ of mandate is therefore denied and the proceeding dismissed.

Van Dyke, J., Beatty, C. J., Lorigan, J., Shaw, J., McFarland, J., and Henshaw J., concurred.

Rehearing denied.

Special and Class Legislation is discussed generally in the monographic note to State v. Ellet, 21 Am. St. Rep. 780-789. And the constitutional inhibition against special or local legislation where a general law can be made applicable is discussed in the monographic note to Sanitary District v. Ray, 93 Am. St. Rep. 106-113. The legislature is competent to enact laws applicable to a certain class of citizens only, if the classification is based upon real and inherent distinctions, and is not arbitrary and unreasonable, and the statute applies alike to all belonging to the class: Davis Coal Co. v. Pollard, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; Porter v. Charleston etc. Ry. Co., 63 S. C. 169, 90 Am. St. Rep. 670, 41 S. E. 108; State v. Justus, 85 Minn. 279, 89 Am. St. Rep. 550, 88 N. W. 759. See, too, State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; Mathews v. People, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28.

Statutes must Receive Every Presumption in favor of their validity, and are not to be overthrown by the courts unless clearly unconstitutional: Farm Investment Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258; Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851; Isenhour v. State, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; Chamberlain v. Wood, 15 S. Dak. 216, 91 Am. St. Rep. 674, 88 N. W. 109; State v. Sopher, 25 Utah, 318, 95 Am. St. Rep. 845, 71 Pac. 482.

The Titles of Statutes, in respect to their sufficiency under the constitutional requirements, are discussed in the monographic notes to Bobel v. People, 64 Am. St. Rep. 70-107; Crookston v. County Commissioners, 79 Am. St. Rep. 456-486. And this subject is further discussed, with special reference to the amendment and revision of codes, in the monographic note to Lewis v. Dunne, 86 Am. St. Rep. 267-279.

HARRINGTON v. LOS ANGELES RAILWAY COMPANY.

[140 Cal. 514, 74 Pac. 15.]

NEGLIGENCE—Violation of a Municipal Ordinance.—The riding of a bicycle at a rate of speed prohibited by a municipal ordinance is negligence, and an injury resulting to the rider therefrom must be deemed due to his contributory negligence. (p. 88.)

NEGLIGENCE, CONTRIBUTORY—Duty to Avoid Injuring the Person Guilty of.—He who last has a clear opportunity to avoid an accident by the exercise of proper care to avoid injuring others must do so. (pp. 89, 91.)

STREET RAILWAYS—When have no Right to Rely on the Presumption that Persons will Care for Themselves.—The motorman of an electric car, who knows that bicycle racers are traveling at the rate of twenty miles per hour along a narrow path lined with spectators on both sides, and only eighty-five feet away from a place on that path which his car is about to cross, is chargeable with the knowledge that they are all in a position of great peril, and hence has no right to assume that they will be able to care for themselves by taking the necessary precautions to observe the approach of a car, to escape injury from it. (p. 89.)

NEGLIGENCE.—A Person in Great Peril where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. The reasonableness of his effort to escape injury after the discovery of the danger is a question for the jury, to be determined in view of all the circumstances disclosed by the evidence. (pp. 90, 91.)

NEGLIGENCE—Liability for Injuring Person Guilty of.—If a motorman of a street railway company, knowing that a bicycle rider is guilty of negligence in riding at a high rate of speed contrary to the provisions of a municipal ordinance, and that it is doubtful whether such rider may remove himself from his peril, and also knowing that by the stopping of the car the danger to the rider would be removed, nevertheless causes it to be propelled forward to the path over which the rider was approaching, whereby he is injured and killed, the company is answerable in damages. (p. 91.)

NEGLIGENCE, CONTRIBUTORY—When does not Constitute a Defense.—When an act is done willfully and wantonly, contributory negligence on the part of the injured person does not bar his recovery. (p. 92.)

NEGLIGENCE—Knowledge that Person is in Peril—What Sufficient.—While it is essential to liability for injuring a person placed in peril by his own negligence that the defendant know of the danger, and not sufficient that he would have discovered it but for remissness on his part, yet it is not necessary that he know that the injury is inevitable if he fails to exercise care. It is sufficient that the circumstances of which he or his agent has notice are such as convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. (p. 92.)

NEGLIGENCE, WANTON, Though There is no Intent to Injure.—Though one has no intent to injure, yet if there is on his part a reckless indifference or disregard of the natural or probable consequences of doing or omitting to do the act, and he does or fails to do it, conscious from his knowledge of existing circumstances and conditions that his conduct will kill or probably result in injury, he is guilty of wanton negligence. (p. 94.)

NEGLIGENCE, GROSS—Instruction to Jury, When not Proper.—An instruction that if a person injured in colliding with a street-car while riding a bicycle race, was riding at a rate of speed exceeding that permitted by a municipal ordinance, and did not look for an approaching car until it was too late to bring his bicycle to a standstill, so as to avoid a collision, and did not at any time attempt to reduce the speed of the bicycle before the collision occurred, he was guilty of gross negligence, is properly refused. It is for the jury to say, taking all the circumstances into consideration, whether the failure of the rider to look for an approaching car or to attempt to reduce his speed was gross negligence. (pp. 95, 96.)

Bicknell, Gibson & Trask and Dunn & Crutcher, for the appellant.

Hunsaker & Britt and Charles L. Batcheller, for the respondents.

[517] ANGELLOTTI, J. This action was instituted by the plaintiffs, the widow and minor children of Arthur E. Harrington, deceased, for damages alleged to have been sustained by them by reason of the death of deceased, which death was alleged to have been caused by the negligence of defendant. A verdict was rendered in plaintiff's favor for ten thousand dollars, and from the judgment entered thereon and an order denying its motion for a new trial defendant has appealed.

It is earnestly contended that the evidence was insufficient to sustain the verdict. The claim in this regard is that, assuming [518] that the defendant was negligent, still the evidence shows that the deceased was guilty of such contributory negligence as will preclude a recovery on the part of plaintiffs.

The deceased was at the time of the accident, July 4, 1900, participating in a long-distance handicap bicycle race from Los Angeles to San Pedro or Santa Monica, a distance of about twenty miles. This race was described as "the usual Fourth of July race." The start was from the corner of Sixth and San Pedro streets in the city of Los Angeles, and the course was southerly from Sixth street along San Pedro street, between the double tracks of defendant's street railway on said street as far as Washington street. On Ninth street, which intersects San Pedro street between Sixth and Washington street, was a single track railway of the defendant, crossing said double tracks on San Pedro street nearly at right angles. The participants in the race were numerous, probably more than one hundred, and they were started in groups, every fifteen seconds, or less in some cases, for about twelve minutes. Several groups of riders had preceded the group of which deceased was a member, and which consisted of nine men. While the last four of these riders were approaching the Ninth street track, the other five having already crossed the same, one of defendant's ninth street electric cars, proceeding westerly along said street, crossed San Pedro street in front of them. The riders were going at a high rate of speed, probably twenty miles an hour, although some of the witnesses put it a little lower and some higher. The car was proceeding two and one-half to four miles an hour. The deceased, having discovered the approach of the car, left the group with which he was riding and attempted either to pass in front of the car on the westerly side of San Pedro street, or to turn up Ninth street, and in so doing

collided with the right-hand front corner of the car and was killed. The other three riders attempted to pass by the rear of the car. One of them testified that when about fifteen or twenty feet from the car he threw himself sideways from his wheel to avoid striking the car, which he would otherwise have done, and, striking the ground, rolled clear to the car against its side, and the other two riders fell over him. The railway tracks on San Pedro street were lined with people [119] witnessing the race, such lines extending across Ninth street and the railway tracks of the defendant thereon.

At the time of the accident there was an ordinance of the city of Los Angeles which prohibited any person from riding or propelling any bicycle within the corporate limits of the city at a rate of speed greater than eight miles per hour. The deceased was violating this ordinance, and was consequently guilty of negligence, without which, undoubtedly, the accident would not have occurred. If there had been no ordinance regulating the speed of bicyclists, it might well be contended that the evidence would have sustained a finding of the jury that the deceased had not been guilty of contributory negligence, a finding that, under all the circumstances shown, the deceased was justified in assuming that the course between the railway tracks along San Pedro street would be kept sufficiently clear of obstructions to allow him to go at as high a rate of speed as he could, that he used all such precautions as a reasonable man under the same circumstances would use, that he discovered defendant's car as promptly as a reasonable man using such precautions would discover it, and that, when he discovered the car, he used reasonable care in attempting to avoid a collision therewith. But he was guilty of negligence in his violation of the provisions of the ordinance, and if it had not been for this negligence on his part, the accident would not have occurred.

The complaint alleges that the defendant did, by its motorman having charge of the operation of the car, "negligently, wantonly, and with wanton and reckless indifference to the safety of said Arthur E. Harrington, drive and propel said car against him, ... who was then and there in full sight and view of said motorman," in consequence of all which said Harrington died.

The claim of the plaintiffs in this connection is that, notwithstanding the negligence of the deceased, the motorman

was aware of the perilous position in which the deceased had placed himself, and could, by the exercise of ordinary care, have avoided the accident, but failed to exercise such care to so do, and recklessly drove his car forward in the path of the racers, and that this negligence on his part was the proximate cause of the death of the deceased. It will thus be seen that plaintiffs invoked the rule enunciated in several opinions of this court to the effect that he who last has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring others must do so.

There was ample evidence to justify the jury in finding that defendant's motorman discovered the perilous position in which the deceased and his companions were placed at such a time and under such circumstances, that he could by the exercise of ordinary care have avoided injuring them, and that he did not exercise such care. It needs no argument to demonstrate that bicycle racers traveling at the rate of twenty miles an hour or more along a narrow path lined with spectators on both sides, and only eighty-five feet away (as the testimony of one disinterested witness indicated) from a place on that path toward which they were going over which an electric car was about to cross, were already in a position of great peril by reason of the approach of said car. Such circumstances would naturally convey to the mind of any reasonable man having knowledge thereof the question as to whether the riders, even though they immediately discovered the approach of the car, which was doubtful, would be able to get out of the way, and whether they must not inevitably cross the track along which the car was about to go, however much they might endeavor to avoid so doing after discovering the car, in order to escape collision. There is no parallel between a case presenting such circumstances and the ordinary case where a person is discovered walking or riding toward a railroad track. Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on the track at such a time as to be injured thereby. But no such assumption could be held to be justified under the peculiar circumstances already stated.

There was evidence warranting the jury in finding that the motorman, who confessedly knew that the bicycle race was

then in progress on San Pedro street, was warned by some of the numerous bystanders before he had reached the easterly line of San Pedro street that the racers were coming, [321] some calling upon him to stop the car, and others exclaiming that the racers were coming; that some stood on the track in front of the car, endeavoring to stop the car by calling upon the motorman. He nevertheless proceeded, traveling at from two and one-half to four miles per hour, forcing the people in front to retire from the track; that he himself, after hearing the various warnings, saw the racers approaching under the circumstances already detailed, when he was still at least twenty or twenty-five feet east of the easterly line of the path along which they were proceeding; that after such discovery he could easily have stopped his car before it reached the path along which the bicyclists were proceeding, and thus have insured absolute safety to the riders, but that, on the contrary, he pushed his car forward, in reckless disregard of the dangerous position of deceased and his companions, knowing, or having reasonable cause to believe, that they must cross the track over which he was about to go. It is true that the evidence is conflicting on some material points, and that the motorman testified that he did not discover the approach of the riders until it was too late to stop, and that he then used all reasonable care to avoid injuring them. But the jury evidently did not believe this evidence to be true, and it was for them to determine the facts. There was also ample evidence to justify the jury in finding that immediately upon discovering his dangerous position the deceased exercised reasonable care in endeavoring to avoid injury. One of his fellow-riders testified that the deceased exclaimed: "My God! Look at that car!" And immediately switched off and tried, as he supposed, to go around the front end of the car. The fatal result and the escape from serious injury of the others is in no way determinative of the question as to whether he used such reasonable care, for, as has been well said, "It is always easy, after an accident, to see how it could have been avoided, but a man's duty before the calamity is not measured by such ex post facto information": Liverpool etc. Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 439, 58 Pac. 55. It must be remembered that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent

man under ordinary circumstances. The reasonableness of [522] his effort to escape injury after discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. We therefore have a case where the jury were warranted in finding the facts to be as follows, viz.: Deceased, by reason of his own negligence, was placed in a position of peril with relation to defendant's car. The defendant knew that the deceased was so placed, knew that it was at least doubtful whether the deceased could by any act of his remove himself from such peril, and knew that it could by the exercise of ordinary care, by simply stopping its car, absolutely remove the source of danger and avoid the injury. It failed to exercise such care, and recklessly pushed its car forward into the path over which the deceased was approaching, its motorman preferring to take the chance of getting over before deceased arrived at the crossing. The deceased, immediately upon discovering his dangerous position, used all reasonable care, and made all practicable effort to avoid the accident.

Upon this state of facts, established as the facts of this case by the verdict of the jury, the liability of the defendant follows as a matter of law, and the verdict is fully sustained by the evidence.

It would be difficult to find a case more clearly justifying the application of the rule so often approved by this court, to the effect that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter placed himself in such situation of danger by his own negligence: Lee v. Market Street Ry. Co., 135 Cal. 293, 67 Pac. 765; Fox v. Oakland Cons. St. Ry. Co., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500; Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 Pac. 452; Abrahams v. Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216; Crowley v. City R. R. Co., 60 Cal. 628; Meeks v. Southern Pacific R. R. Co., 56 Cal. 513, 38 Am. Rep. 67, and note; Needham v. San Francisco etc. R. R. Co., 37 Cal. 409. It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that [523] defendant has been guilty of willful and wanton negligence. In either case the liability would exist, for where an

act is done willfully and wantonly, contributory negligence upon the part of the injured person is no bar to a recovery: Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500. As said by Mr. Beach in his work on Contributory Negligence: "When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not willful negligence." It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part: Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651. This, however, does not mean, as seems to be contended, that defendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position. It was said in the prevailing opinion in Everett v. Los Angeles etc. Ry. Co., 115 Cal. 125, 126, 43 Pac. 207, 46 Pac. 889, distinguishing that case from those where the principle under discussion is applicable: "The case is not like one where the injured party is discovered in time lying or standing upon a railroad track under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is seen attempting either on foot or otherwise to make a crossing; or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible. . . . . Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way": See, also, Meeks v. Southern Pacific R. R. Co., 56 Cal. 513, 515, 38 Am. Rep. 67, and note.

[524] It cannot be held, in view of the evidence in the record and the finding of the jury, that the negligence of the deceased continued to the moment of the accident, and that both parties were contemporaneously and actively in fault at the

time thereof, and what is said in several cases as to the inability of the injured party to recover under such conditions (see Holmes v. South Pacific Coast Ry. Co., 97 Cal. 161, 31 Pac. 834; Sego v. Southern Pacific Co., 137 Cal. 405, 70 Pac. 279; Everett v. Los Angeles etc. Ry. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, is inapplicable here. The deceased did unquestionably discover his dangerous situation before the accident, and the verdict is a finding that he used all reasonable care and made all practicable effort to avoid the accident.

Defendant contends that there may have been a moment after the motorman discovered the approach of the racers during which deceased had failed to discover the approach of the car, and that during this moment deceased continued to proceed until it was too late to escape injury, and that he was thereby guilty of negligence precluding a recovery. It may be freely admitted that the deceased did not discover the approach of the car as early as the motorman discovered the approach of the deceased, but we are unable to see anything to the advantage of defendant's cause in such a condition of affairs. If the motorman discovered the deceased in a dangerous situation, and the jury have found that he did, it was his duty to use ordinary care to avoid injuring him, regardless of whether or not the deceased was aware of his approach—and the jury have found that he did not use such care.

That the evidence was sufficient to justify a conclusion that the motorman had the last clear opportunity to avoid the accident seems very clear. We shall have occasion to consider this contention of defendant again, in discussing the instructions to the jury.

The motorman, Myer, having been examined by defendant as to the circumstances of the accident, was asked: "Would you have moved that car in there, if you had supposed thereby you were endangering the lives of those bicycle riders?" Plaintiffs' objection thereto was sustained. The witness then testified as follows: "I thought that it was best [525] to move on at that juncture, because I thought I had plenty of time, and also that it was dangerous for me to stop the car at that time." It is unnecessary to discuss the question as to whether or not error was committed in sustaining the objection, for the subsequent testimony of the witness was a complete statement as to his reason for moving the car forward. He said that he thought he had plenty of time to cross, and that it would be dangerous to stop. This excludes any supposition that he was

endangering the lives of the riders by moving on. What he would have done as to moving on, if he had supposed otherwise than he did, is entirely immaterial.

Complaint is made as to various instructions given at the request of the plaintiffs. It is urged that the jury may have concluded from plaintiffs' fourth instruction that they were authorized in finding a verdict against the defendant, although they may have believed that the motorman neither expressly nor impliedly intended to injure deceased or anyone else. No purpose or design on the part of the motorman to injure was essential to defendant's liability, and the plain object of the instruction was to so inform the jury. By it the jury were substantially told that although one might not have the actual intent to injure, still if there is on his part a reckless indifference or disregard of the natural or probable consequences of doing or omitting to do an act, and he does or fails to do the act, conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury, he is guilty of wanton negligence. We see no prejudicial error in this statement: Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500; Everett v. Los Angeles etc. Ry. Co., 115 Cal. 127, 43 Pac. 207, 46 Pac. 889; Beach on Contributory Negligence, secs. 55, 62.

Defendant's objection to plaintiffs' instructions 5, 6, 7, and 9 is, that they are predicated upon an alleged erroneous theory of the law—viz., that where the injured party's own negligence brings him into danger, and defendant discovers the danger in time to avoid ensuing injury by the exercise of ordinary care, and fails to exercise such care, the defendant is liable notwithstanding such negligence of the injured party, if he, the injured party, after discovering his own danger, exercises ordinary care to escape the injury. This, it is urged, relieved the injured party entirely from the consequences of his negligent failure to discover his own danger resulting from his own negligence. We see no force in the contention that the theory upon which it is said these instructions were predicated is erroneous. Such an instruction is applicable by its terms only in the event that the defendant discovers the negligent injured party already in a dangerous position, discovers him under such circumstances as preclude him from indulging in any assumption that he, the injured party, can or will get out of the way. It is only because of such discovery that he is called upon to exercise ordinary care to avoid in-

juring him. Upon such discovery, it is his plain duty to use ordinary care to avoid injuring the negligent party, and if he has a clear opportunity to avoid such injury—i. e., "such an opportunity as would necessarily be clear and plain to a man of ordinary intelligence and prudence in a given emergency"—and fails to take advantage thereof, he is liable for the injury, provided the other is not negligent after he discovers the danger. In such a case, he who knows of the danger, and recklessly proceeds regardless thereof, can find no refuge in the fact that the injured party who does not know of it would have known if he had used reasonable care to ascertain it. In such a case he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident. If a motorman should discover a man asleep on the track in front, and knowing him to be asleep, should proceed, regardless of his position and condition, and run over him with his car while still asleep, there would be very little question that the motorman had the last clear opportunity, and that his negligence was the proximate cause of the injury.

As said before, such a case has no feature in common with one where the circumstances are such that the defendant has the right to assume that the other party can and will protect himself, and, consequently, that he is not in a dangerous situation. There was no prejudicial error in the modification by the court of defendant's requested instruction 4. It was sought by this requested instruction to have the jury instructed [527] that if the deceased was at the time of the race propelling his bicycle at a rate of speed in excess of eight miles an hour, and did not look for an approaching car until it was too late to bring his bicycle to a standstill so as to avoid a collision, and did not at any time attempt to reduce the speed of said bicycle before said collision occurred, he was guilty of "gross" negligence. The court modified this by adding, "or did not attempt to turn it out of the way of said car before said collision occurred," as one of the prerequisites of gross negligence on the part of the deceased.

The defendant was not entitled to have the instruction given as requested. It is true that if deceased was riding at a rate of speed in excess of eight miles per hour, he was guilty of negligence as a matter of law, because of the city ordinance prohibiting such speed. That, however, was a matter fully covered by other instructions. Under the peculiar facts of

this case, it was for the jury to say, taking into consideration all of the circumstances, whether a failure on the part of deceased to look for an approaching car in time to prevent a collision or a failure to attempt to reduce the speed of the bicycle was negligence at all, much less "gross" negligence, which term we suppose was used as an equivalent of "willful or wanton" negligence. While it is true that the modification under the undisputed evidence, took away the whole effect of the requested instruction, it did not add anything prejudicial to defendant's case, and, as the defendant was not entitled to the instruction at all, it cannot complain of the modification.

Certain instructions of defendant, directing a verdict in its favor if certain facts were found, were modified by adding a proviso of this character, viz.: "Unless you shall also find that the motorman in charge of defendant's car, after perceiving the dangerous situation then and there existing, did recklessly or wantonly send his car forward. Whether or not such reckless or wanton conduct of the defendant did occur and cause the collision, is a question of fact for you to determine from the evidence, the same as you must determine other facts submitted." It is urged that these instructions make "recklessness" the equivalent of "wantonness," and that the terms are not synonymous. If one does a thing [528] recklessly, without regard to the rights of another, he comes within the terms of the very definition of "wanton" cited by learned counsel for defendant, and if one, perceiving the dangerous situation of another, proceeds recklessly without regard thereto, there is little room for the claim that he is not doing a thing "recklessly without regard to the rights of another." We can see no distinction between the terms as used in these instructions.

We find no prejudicial error in the modification of defendant's requested instructions 10, 12, 15, 18, and 27. By instructions given, the jury were instructed in as favorable terms as defendant could ask as to what constituted ordinary care, as to the obligation of the deceased to exercise such care for his own safety, and as to proximate cause, and further, in effect, that if they found that the collision was in any degree due to the want of proper care and caution on the part of deceased, and not to any intervening cause proceeding from the defendant, their verdict must be for defendant. The modification of the tenth requested instruction consisted entirely in the omission of matter which would have with-

drawn from the jury all question as to the effect of the conduct of defendant after discovering the peril of deceased. The twelfth requested instruction was erroneous, in that it precluded a recovery by the plaintiffs if the jury found that if the deceased had exercised ordinary care to have discovered the danger, he would have discovered it in time to have avoided a collision, thus again withdrawing from the jury all consideration of the conduct of defendant after discovering the peril of deceased. The omission by the court of the words "and your verdict should be for defendant," which was the only modification made, was therefore not erroneous.

The portion of the fifteenth requested instruction that was omitted by the court was substantially covered by other instructions given.

The eighteenth requested instruction was erroneous, for the same reason as the tenth and twelfth, already noted. The requested instruction was to the effect that if the deceased by looking or listening with ordinary care might have discovered the car approaching, and did not exercise such care, he was guilty of such negligence as would prevent a recovery [520] by plaintiffs, and the modification by the court consisted in the addition of the words "as against any ordinary negligence of the defendant." This could not be understood, under the circumstances of this case and the other instructions, as importing any part of the doctrine of comparative negligence into the case. The words "ordinary negligence," as there used, plainly meant such negligence as might have existed on the part of defendant, in the absence of actual knowledge on its part of the perilous situation of the deceased, and a clear opportunity to avoid injuring him.

The twenty-seventh requested instruction was erroneous for the same reason as the tenth, twelfth, and eighteenth, and the modification thereof was proper.

Finally, it is claimed that the verdict is against law, in that it is contrary to an instruction wherein the jury were told that if they believed from the evidence that deceased approached the crossing where the accident occurred at a reckless rate of speed, without exercising any care or caution to ascertain whether any person was on or approaching the same, and that in consequence thereof the collision occurred, he was guilty of willful and wanton negligence, and their verdict must be for the defendant, notwithstanding any failure on the part of the motorman to exercise ordinary care.

In reply to this contention, it is sufficient to say that, in our judgment, the evidence was not such that the jury was bound to find that deceased approached said crossing without exercising any care or caution to ascertain whether any person was on or approaching the same, or that in consequence of such approach the collision occurred.

The judgment and order are affirmed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

When Both Parties are Negligent, the one who has a last clear opportunity to avoid an accident, notwithstanding the contributory negligence of the injured party, is considered solely responsible for it: Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281, 67 Am. St. Rep. 621, 52 Pac. 92; Pickett v. Wilmington etc. R. R. Co., 117 N. C. 616, 53 Am. St. Rep. 611, 23 S. E. 264; Keefe v. Chicago etc. Ry. Co., 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; Fonda v. St. Paul City Ry. Co., 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166; Hall v. Ogden City St. Ry. Co., 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046. In the above cases this rule is applied where persons are struck and injured on the track by approaching street-cars or railway trains.

The Plea of Contributory Negligence is no defense to wantonness or willfulness on the part of the defendant: Louisville etc. R. R. Co. v. Markee, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511; Highland Ave. etc. R. R. Co. v. Robbins, 124 Ala. 113, 82 Am. St. Rep. 153, 27 South. 422; Lake Shore etc. Ry. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; Florida Southern Ry. Co. v. Hirst, 30 Fla. 1, 32 Am. St. Rep. 17, 11 South. 506; Illinois Cent. R. R. Co. v. King, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552; Galveston etc. Ry. Co. v. Zanzinger, 92 Tex. 365, 71 Am. St. Rep. 859, 48 S. W. 563; nor to gross negligence or conduct indicating a reckless disregard to the rights of others: Western Ry. v. Mutch, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894; McDonald v. International etc. Ry. Co., 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939. See, also, Bolin v. Chicago etc. Ry. Co., 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446; Illinois Cent. R. R. Co. v. Leiner, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398; Tully v. Philadelphia etc. R. R. Co., 2 Penne. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019. Though a person injured by a street-car was guilty of contributory negligence in placing himself in a situation of danger, he may recover for injuries there sustained, if the person inflicting them, or his servant or agent, was guilty of gross negligence: Fox v. Oakland etc. St. Ry., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

Contributory Negligence is not always chargeable upon the failure to exercise the greatest prudence or the best judgment in cases where one is required to act suddenly, or in an emergency: Valin v. Milwaukee etc. R. R. Co., 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084; Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094.

CASES

IN THE

SUPREME COURT

OF

GEORGIA.

RICE v. STATE.

[118 Ga. 48, 44 S. E. 805.]

LARCENY OF PROPERTY in the Custody of an Infant.—If property is taken and retained by an infant under ten years of age, or other person incapable of committing a crime, the custody is that of the owner, and one taking it from such irresponsible agent with intent to convert it is guilty of larceny, as in case of finding lost goods. (pp. 99, 100.)

LARCENY—Procuring Infant to Take Goods from House.—One may be guilty of larceny from the house if he procures an infant to enter a house to take goods therefrom, and then receives them. (p. 100.)

McDonald, Quincey & Grantham, for the plaintiff in error.

John F. De Lacy, solicitor general, and L. Kennedy, for the defendant in error.

49 LAMAR, J. While the special grounds of the petition for certiorari were not verified by the county judge, the same questions are raised by the assignment that the verdict was contrary to law. The defendant was found guilty of larceny from the house, but in her statement claimed that she had received the property from her eight year old son. He, on being allowed to testify, said that the prosecutrix had given him the articles, telling him at the same time that her husband was going to destroy her, and if the boy could not remove the goods before his return she wanted him to burn down the house.

Where personal property is taken and retained by an idiot, infant under the age of ten years, or other person incapable

of committing a crime, the custody is still that of the owner, and one taking it from such irresponsible agent with intent to convert the same would be guilty of larceny, as in case of finding lost goods: Edwards v. State, 80 Ga. 129, 4 S. E. 268; Berry v. State, 10 Ga. 511 (2); Allen v. State, 91 Ala. 19, 24 Am. St. Rep. 856, 8 South. 665; State v. Learned, 41 Vt. 585. The judge charged that if the defendant received the goods from the infant, she was guilty of larceny; but that if she instructed, counseled, and procured him to enter the house for the purpose of obtaining the personal effects of the owner, she would be guilty—which in legal effect meant that she would be guilty generally of the criminal offense charged. The prosecutrix denied having given the goods to the boy, and, the defendant being found in the recent possession of the stolen property, the jury may well have believed that the preposterous statement of the child did not satisfactorily account for their possession. All the circumstances were sufficient to warrant a verdict of guilty as charged. It is, therefore, unnecessary to consider whether, if the defendant had not counseled, but only knew that the infant had taken the goods from the house, and consented thereto, the ratification would relate back to the original act of removal so as to make her guilty of larceny from the house; or whether, as the custody was in the owner when the animus furandi arose, her guilt could not extend beyond what she herself had done, nor be enlarged by the fact that she knew that the infant had taken the property out of the house under such circumstances as might constitute larceny from the house or burglary in a responsible person.

Judgment affirmed. By five justices.

The Crime of Larceny is the subject of a monographic note to People v. Miller, 88 Am. St. Rep. 559-608. If children find lost property, and, with no intent to steal it, deliver it to their father, who takes it, knowing it to be lost property, and with the felonious intent to appropriate it to his own use, he is guilty of larceny: Allen v. State, 91 Ala. 19, 24 Am. St. Rep. 856, 8 South. 665.

MAYOR AND COUNCIL OF DALTON v. WILSON.

[118 Ga. 100, 44 S. E. 830.]

MUNICIPAL CORPORATION—Judicial and Ministerial Duties.—Municipal corporations are not liable for failure to exercise, or for errors in exercising, their legislative or judicial powers; but they are liable for neglect to perform, or for improper or unskillful performance of their ministerial duties. (pp. 102, 103.)

MUNICIPAL CORPORATION—Liability for Nuisance.—If a Private Individual Maintains a nuisance upon private property, which does not obstruct the public streets or imperil the safety of travelers thereon, the duty of the city to abate it is judicial and not ministerial, and for a failure to discharge this duty no action for damages against the city will lie. (p. 105.)

R. J. & J. McCamy, for the plaintiff in error.

Shumate & Maddox, for the defendant in error.

[100] COBB, J. Wilson brought an action against the mayor and council of the city of Dalton, alleging, in substance, as follows: Petitioner with his family, consisting of a wife and several children, owns and resides upon a lot in the city of Dalton. There is a ditch within about twenty or twenty-five yards from the western end of petitioner's lot, and at the time he commenced to live thereon the water in the ditch ran freely and unobstructed along the ditch, and little or no fecal matter gathered therein. For a number of years petitioner and his family were healthy and free from malarial diseases. Several years after petitioner began to reside on the lot referred to, the Hotel Dalton was built, and "with the advice and consent, and, as petitioner charges and believes, with the co-operation of the mayor and council of the city of Dalton," a sewer was constructed from the hotel and emptied into the ditch near his property. By reason of the construction of this sewer, and on account of the further fact that there is not a great deal of fall to the ditch, foul and fecal matter has accumulated in the bottom of the ditch to the depth of several inches, the result of which is to cause continued illness in petitioner's family from malarial diseases, to render it impossible, especially at certain seasons of the year, for petitioner and his family to reside in their home, and to seriously impair the market value [101] of his property. Petitioner made applications to the city authorities to abate the nuisance, but they have failed and refused to do so, notwithstanding they have passed upon the question and

adjudged the ditch to be a nuisance. The action of the mayor and council in allowing the ditch to remain in its unhealthy and filthy condition and their refusal to abate the same as a nuisance is gross negligence on their part, on account of which action petitioner claims damages, having previously filed his claim therefor with the mayor and council, as the law requires. Certain special demurrers to the petition having been filed, the plaintiff amended so as to allege that, while the minutes of the council do not show any agreement with the Hotel Dalton in regard to the construction of the sewer, there was in fact an agreement and the mayor and council consented that the sewer might be built, and thereby, as petitioner charges, became a party to the construction and direction of the construction of the sewer, as well as the place where it was to empty, well knowing at the time where the contents of the sewer would be emptied. It is also alleged that the Hotel Dalton made with the city of Dalton a contract to indemnify it against damages resulting from the construction of the sewer and its becoming a nuisance, this being a recognition on the part of the city that the sewer would become a nuisance. It is not alleged, either in the petition or the amendment, that the sewer was constructed along a public street, though there is an allegation in the amendment that the sewer crossed the streets of the city, and that this was done with the permission and consent of the city authorities. It is also alleged that the charter of the city of Dalton gives the mayor and council absolute authority to abate nuisances, and that their failure to abate a nuisance in a given instance is a ministerial duty, for the breach of which the municipality is liable. In addition to the special demurrers above referred to, the defendant demurred generally to the petition; and its demurrers being overruled, it excepted.

"Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers": Pol. Code, sec. 748. See, also, Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787; Collins v. Macon, 69 Ga. 542; Wright v. Augusta, 78 Ga. 241, 6 Am. St. Rep. 256; Love v. Atlanta, 95 Ga. 129, 51 Am. St. Rep. 64, 22 S. E. 29; Nisbet v. Atlanta, 97 Ga. 650, 25 S. E. 173; Wyatt v. Rome, 105 Ga. 312, 70 Am. St. Rep. 41, 31 S. E. 188; Tarbutton v. Tennille, 110 Ga. 90, 35 S. E. 282; Gray v. Griffin, 111 Ga. 361, 36 S. E. 979; City Council of Augusta v. Owens, 111 Ga. [102] 464, 477, 36 S. E. 830; City Council of Augusta v. Little, 115 Ga. 124, 41 S. E. 238; Nicholson v. Detroit, 129 Mich. 246, 88 N. W.

695; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853; Barron v. Detroit, 94 Mich. 609, 34 Am. St. Rep. 366, 54 N. W. 273; McDade v. Chester, 117 Pa. St. 414, 2 Am. St. Rep. 681, 12 Atl. 421. Municipal corporations are, however, liable "for neglect to perform, or for improper or unskillful performance of their ministerial duties": Pol. Code, sec. 748. See, also, Mayor of Savannah v. Spears, 66 Ga. 304; Collins v. Macon, 69 Ga. 542; Smith v. Atlanta, 75 Ga. 110; City of Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37. In the case of Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, Riely, J., in referring to the distinction above stated, uses the following apt and appropriate language: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character it acts as an agency of the state, to enable it the better to govern that portion of its people residing within the municipality; and to this end there is granted to or imposed upon it, by the charter of its creation, powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate and private character there are granted unto it privileges and powers to be exercised for its own private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and, for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages, in the same manner as an individual or private corporation. The line of distinction is clearly drawn by the courts and text-writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established." Cases often arise where the courts find it difficult to determine to which class they belong, but the distinction between the two classes is none the less definitely drawn in the law. The conflict in the decisions on the subject is due to the fact that different courts have not reached the same conclusion upon a similar state

of facts where the cases are near the line that bounds the two classes.

As a general rule, the courts have held that the duty imposed upon municipalities to abate nuisances existing upon private property within its limits is a duty which is judicial in its nature, and that for a failure to perform this duty, or for errors in the performance of it, the municipality is not liable in damages: Armstrong v. Brunswick, 79 Mo. 319; Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545. There are also a number of rulings to the effect that where the nuisance is in a public street, the failure to abate it is a judicial rather than a ministerial act, and the city is not liable to an action for damages at the instance of one injured on account of the existence of the nuisance in a public street: Mayor v. Vandegrift, 1 Marv. (Del.) 5, 65 Am. St. Rep. 256, 29 Atl. 1047; Kent v. Cheyenne, 2 Wyo. 6; Campbell v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656. In some cases municipalities have been held liable for permitting or for failing to abate a nuisance in a public street: Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435; Taylor v. Cumberland, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027. It has also been held that where a nuisance is adjacent to a public street and of such a character that one using the street may be injured thereby, the city is not liable for a failure to abate the same: Cain v. Kansas, 87 Mo. 103, 56 Am. Rep. 443; Butz v. Cavanaugh, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104; Howe v. New Orleans, 12 La. Ann. 481. In this state, where the nuisance is in or near a public street, the municipality is liable to one who uses the streets and thereby suffers special damage from the existence of the nuisance and on account of the failure of the municipality to abate the same: Parker v. Macon, 39 Ga. 725, 99 Am. Dec. 486. The doctrine that the municipality will be liable for failing to abate a nuisance in or near a public street grows out of the well-established rule in this state, that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that the failure to perform this duty constitutes a breach of a ministerial duty and renders the municipality liable to one who is injured by the failure. In such a case the municipal corporation is not held liable for a failure to perform the judicial duty of abating a nuisance, but for the failure to keep its streets and sidewalks free from obstructions which are dangerous to the traveler.

It has been held in Tennessee that a municipal [104] corporation, having charter power to enact ordinances necessary and proper to preserve the public health and to prevent and remove nuisances, is indictable for permitting a slaughter-house to be kept upon the private property of a citizen within the town, to the detriment of the public health or comfort: State v. Shelbyville, 4 Sneed, 176. An indictment might satisfy the public offense where the nuisance was a public nuisance, and there might be an action for damages against the municipality where the nuisance was maintained by the municipality itself.

But it seems to be well settled that there can be no action for damages where the nuisance is maintained by a private individual upon private property, and the maintenance of the nuisance in no way amounts to an obstruction of a public street or in any way imperils safety of the travelers upon the street. In such a case the remedy of the party aggrieved is by an action for damages against the one who maintains the nuisance; or in the event the party maintaining it is insolvent, or the damages are irreparable, or the nuisance is a continuing one, equity would interfere by injunction to abate the same at the instance of the person aggrieved: Butler v. Thomasville, 74 Ga. 570; Forsyth v. Atlanta, 45 Ga. 152, 12 Am. Rep. 576. Upon the subject of the liability of municipal corporations generally, see Hopkins on Personal Injuries, sec. 469 et seq.; 2 Wood on Nuisances, 3d ed., sec. 748 et seq.; 2 Dillon on Municipal Corporations, 4th ed., secs. 949 et seq., 1048 et seq. The petition in the present case properly construed does not set forth a cause of action against the city for maintaining a nuisance. It is not claimed that the allegations are sufficient to make a case where the municipality is in direct control of the property upon which the alleged nuisance exists, or of the ditch or sewer which is alleged to constitute the nuisance. The allegations of the petition are to be construed most strongly against the petitioner, and under these allegations the case is to be dealt with as if the ditch were wholly on private property and owned by private individuals. It is not in terms alleged that the municipality maintains, controls, or operates the alleged nuisance. The petition at most alleges merely permissive conduct on the part of the city, and a failure and refusal to abate the alleged nuisance. It has, under its charter, the right to abate a nuisance. If the sewer and ditch are maintained as a nuisance, it is the duty of the city to abate it; but

this duty is judicial and not ministerial, and for a failure to exercise this duty or [105] for errors in attempting to exercise it the city is not liable to an action of damages. There is no allegation that the sewer or ditch interferes in any way with safe passage along the public streets; and the mere fact that the city consented to the construction of the sewer and acted in such a way as to recognize that if it became a nuisance the city would be liable to persons injured by it, and the further fact that it adjudged the sewer to be a nuisance, does not render it liable for a failure to abate it. The fact remains that the nuisance is maintained by private individuals on private property, and, so far as the allegations of the petition are concerned, does not interfere with the safe use of the public streets of the city. The judge erred in overruling the demurrer.

Judgment reversed. By five justices.

Municipal Corporations are not liable to an action for damages, either for the nonexercise of, or for the manner in which they in good faith exercise, discretionary powers of a judicial, legislative, or governmental character: Ewen v. Philadelphia, 194 Pa. St. 548, 75 Am. St. Rep. 712, 45 Atl. 339; Bartlett v. Clarksburg, 45 W. Va. 393, 72 Am. St. Rep. 817, 31 S. E. 918; Esberg Cigar Co. v. Portland, 34 Or. 282, 75 Am. St. Rep. 651, 55 Pac. 961; Prichard v. Board of Commissioners, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353. But municipal immunity does not extend beyond such governmental duties: Judd v. Hartford, 72 Conn. 350, 77 Am. St. Rep. 350, 44 Atl. 510. In respect to the private character of its powers and obligations, a municipality is subject to the same rule of liability as an individual is: New Orleans v. Kerr, 50 La. Ann. 413, 69 Am. St. Rep. 442, 23 South. 384; Potter v. New Whatcom, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394. See, too, Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668. See the discussion of this question in the monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 376-413.

The Liability of a City for Failure to Abate Nuisances is discussed in the monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 397. See, too, Butz v. Cavanaugh, 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104; Mayor etc. of Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 65 Am. St. Rep. 256, 29 Atl. 1047.

AIKEN v. SOUTHERN RAILWAY COMPANY.

[118 Ga. 118, 44 S. E. 828.]

CARRIER, NEGLIGENCE OF.—A Passenger has Two Remedies between which to elect when injured by a carrier's negligence, one an action for breach of contract and the other an action on the case for the wrong. (p. 108.)

CARRIER.—An Ordinary Railway Ticket is not a Contract between the passenger and carrier, but is evidence of the right to transportation furnished in consequence of a contract to carry. (pp. 108, 109.)

CARRIER—Purchase of Ticket by Husband for His Wife.— The purchase of an ordinary railway ticket by a husband for his wife does not constitute a contract between him and the carrier for her safe transportation, but the contract for safe passage which the law implies is in her favor, and in her behalf alone can an action be maintained for its breach. (p. 109.)

Bunn & Trawick, for the plaintiff.

Shumate & Maddox and Fielder & Ault, for the defendant.

119 COBB, J. Aiken, as administrator of King, brought suit against the Southern Railway Company, on January 20, 1902, alleging that King was the husband of Eugenia King, and that on the 15th of September, 1897, King, "desiring to go with his wife and other members of his family to Cedartown, Georgia, upon a visit, contracted with the said Southern Railway Company, through its ticket agent at Brunswick, Georgia, to be carried, together with his wife, from Brunswick, Georgia, to Rockmart, Georgia, in said county of Polk, and that his wife and himself should be safely transported by said defendant and landed safely at Rockmart, Georgia, and he purchased from the said defendant, through its said agent at Brunswick, a ticket for himself and a ticket for his wife, and a ticket for the other members of his family, paying for said ticket for his wife, as well as for the others, the usual passenger fare from Brunswick, Georgia, to Rockmart, Georgia." It was further alleged that "in consideration of said price paid for said ticket for Mrs. Eugenia King by her husband, the defendant undertook and promised to convey her from Brunswick, Georgia, to Rockmart, Georgia, and to afford her all reasonable and proper opportunities safely to alight from the train." The petition then avers, in substance, that, after purchasing the tickets and making the contract with the defendant, King and his wife and the other members of his family entered the train of the defendant at

Brunswick and surrendered their tickets to the conductor; that they were safely conveyed until they reached the town of Rockmart, when Mrs. King received painful and serious injuries as a result of the negligent jerking of the train while she was attempting to alight therefrom. The petition sets forth in detail the circumstances under which she was injured, and the extent of her injuries. The value of her services is set forth, and also various items of expense which her husband incurred by reason of the accident. A general demurrer to the petition was sustained, and the plaintiff excepted.

Where a person makes a contract with a railway company engaged in the business of a common carrier to be transported from one point to another along its line of road, and he is injured by the [120] negligence of the carrier, he has two remedies: one an action for a breach of the contract, and the other an action on the case for the wrong; and he may elect which of the remedies he will pursue: Patterson v. Augusta etc. Ry. Co., 94 Ga. 140, 21 S. E. 283. See, also, Civ. Code, sec. 3811. "Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract": Whittenton Mfg. Co. v. Memphis etc. Packet Co., 21 Fed. 896. When the petition in the present case is construed as a whole, we think it sufficiently appears that the purpose of the pleader was to bring an action on the alleged contract of carriage. So construing it, it is to be determined whether it sets forth a cause of action. Does it sufficiently appear that the railway company entered into a contract with King for the safe transportation of his wife? It is alleged in terms that King contracted with the railway company, but the manner in which the contract was made is also set forth, and from this it is apparent that King made no other contract than one which would arise from the mere purchase of an ordinary ticket for his wife. The question therefore arises whether, when one purchases such a ticket from a railway company for the use of another, and there are no other transactions or negotiations between the purchaser and the company, the contract of carriage is made with the purchaser of the ticket, or with the one who uses the ticket as evidence of a right to passage. While there has been some difference of opinion as to whether a railroad ticket constitutes a contract, by the great weight of authority "the ordinary ticket is not a contract, but is evidence of the right to transportation

furnished to the passenger in consequence of a contract to carry, and is intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract": 6 Cyc. 570. See, also, 25 Am. & Eng. Ency. of Law, 1st ed., 1074; 1 Fetter on Carriers, sec. 275; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; McClain's Cases on Carriers, 57, 222, 663, 682. In Boyd v. Spencer, 103 Ga. 828, 68 Am. St. Rep. 146, 30 S. E. 841, this language was used: "A ticket issued to a passenger by a common carrier does not constitute the contract between the parties, unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as [121] the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system": See, also, Southern Ry. Co. v. Watson, 110 Ga. 691, 36 S. E. 209. There is nothing alleged in the petition as to the character of the ticket purchased by King for his wife, and it is to be presumed that it was the ordinary ticket indicating the points between which the passenger was to be transported. When one purchases an ordinary ticket from the ticket agent of a railway company, and there is no other communication between the purchaser and the company than the application to the ticket agent for the ticket, the delivery of the ticket, and the payment of the price, the railway company, by the delivery of the ticket under such circumstances, undertakes to safely transport and carry any person who may enter its cars as a passenger having possession of such ticket. In the absence of some express agreement to the contrary, this is the undertaking of the company. If the purchaser himself becomes the passenger, he has a right to rely upon the implied contract of safe transportation. On the other hand, if he does not become the passenger but delivers the ticket to some one else, either for a valuable consideration or gratuitously, the implied obligation on the part of the railway company to safely transport arises in favor of him who presents himself as a passenger and tenders the ticket as evidence of his right to passage. In other words, in such a case the contract entered into by the railway company at the time the ticket is delivered is simply a contract safely to transport whoever may present himself as a passenger holding the ticket. We do not mean to hold that a husband might

not make an express contract with a railway company for the safe transportation of his wife; but it would seem that where such a contract was claimed, it would be incumbent upon the person setting it up to show that the agent with whom it was made had authority to do so. What we do mean to hold is that the mere purchase of an ordinary ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the purchaser and the company for the safe transportation of the wife, but the implied contract for safe passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone can an action be maintained for its breach. Of course, we do not mean to hold that where a railroad company has undertaken to [122] safely carry a wife, or child, or servant, the husband, or father, or master may not, in an action of tort, recover any damages he sustains on account of injuries received by the wife, child or servant, in consequence of the negligence of the carrier. The recovery in such a case is for the injury to the husband, father or master, on account of the tort, and not for the breach of any implied contract which the law raises in his favor. The only case called to our attention which seems to be at all in conflict with what is above laid down is the case of Jacksonville etc. Ry. Co. v. Mitchell, 32 Fla. 77, 13 South. 673. In that case it was held that a husband traveling with his wife, where he purchased tickets for himself and his wife and had his own and her baggage checked to the point of destination, might sue the company in his own name for the loss of the wife's trunk containing her wearing apparel and that of her child. It seems, though, that this decision was put upon the special ownership which the husband had in the property of his wife which was intrusted to his care—that is, not so much upon the ticket which he had bought for his wife, but upon that which he had purchased for himself. If the case cannot be distinguished upon the ground stated, it seems to us to be manifestly unsound. See, in this connection, 2 Fetter on Carriers, sec. 644.

Judgment affirmed. By five justices.

A Railway Ticket is generally considered to be but evidence of the contract of carriage between the carrier and passenger: O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, and cases cited in the cross-reference note thereto; note to Kansas City etc. R. R. Co. v. Rodebaugh, 5 Am. St. Rep. 723.

Election of Remedies.—When a duty is imposed by law by reason of the relation of the parties, although the relation was created by contract, a neglect to perform the duty gives the injured party a

right of action, and he may elect to sue upon the contract or bring an action ex delicto: Kansas City etc. R. R. Co. v. Becker, 67 Ark. 1, 77 Am. St. Rep. 78, 53 S. W. 406, See, too, Nevin v. Pullman etc. Co., 106 Ill. 222, 46 Am. Rep. 688; Louisville etc. R. R. Co. v. Gaines, 99 Ky. 411, 59 Am. St. Rep. 465, 36 S. W. 174; McKeon v. Chicago etc. Ry Co., 94 Wis. 477, 59 Am. St. Rep. 910, 69 N. W. 175.

NIX v. ELLIS.

[118 Ga. 345, 45 S. E. 404.]

SETOFF.—Demands Which may be Set Off against each other under the Georgia Code need not be connected, nor grow out of the same transaction, nor have arisen in mutual dealings. (p. 112.)

SETOFF.—An Assigned Chose in Action may be used as a setoff. (p. 112.)

SETOFF.—If the Parties are Mutually Indebted, there are mutual debts. (p. 112.)

SETOFF.—A Receiver Takes the Estate Subject to all Setoffs, liens and encumbrances, and in the plight existing at the date to which his title ultimately is referred. (p. 113.)

SETOFF of Assigned Chose.—One Indebted to a Bank may purchase a claim due by it, and use such claim as a setoff, to the extent of the concurrence of the demands, when sued on the debt which he himself owes. (p. 113.)

SETOFF.—The Right to Purchase Claims to Use as Setoffs against a corporation continues up to the time of the filing of a petition for the appointment of a receiver, although the purchaser knows of the insolvency of the concern. (p. 115.)

J. H. Lumpkin, for the plaintiff in error.

W. A. Dodson and E. A. Hawkins, for the defendant in error.

345 LAMAR, J. Nix was indebted to the People's Bank of Americus two hundred and eight dollars. The bank was indebted to Hines as a depositor three hundred and fifty-five dollars. On March 20, 1902, the bank made an assignment for the benefit of its creditors, and Ellis, assignee, entered and took possession. On the next day Hines, for value received, duly transferred his account 346 against the bank to Nix. On the following day Sullivan and other creditors of the bank filed an equitable petition asking for a receiver and a decree declaring the assignment void. Under this bill Ellis was subsequently appointed receiver for the assets of the bank, and the deed of assignment was declared null and void. The receiver thereupon instituted a suit against Nix, who admitted the indebtedness,

but claimed the right to set off the amount of the bank's indebtedness to Hines, which he had purchased. Nix was not an officer of the bank, and occupied no fiduciary or trust relationship to the creditors: Wilkinson v. Bertock, 111 Ga. 187, 36 S. E. 623. But on the ground that these claims were not mutual, or that the right of setoff, if it ever existed, was defeated by the fact that the purchase was made after the doors of the bank were closed, the judge directed a verdict for the receiver.

It is remarkable that there is hardly a case in our reports which in express terms recognizes the right of a defendant to purchase choses in action, and to use the same by way of setoff: Compare Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 681 (2); Whitaker v. Pope, 48 Ga. 13; Morrow v. Merchants' Bank, 35 Ga. 267. Although it avoided a useless circuity of actions, and was founded in natural equity, this reasonable right was not allowed until the statute of 2 George II, chapter 22, which is the basis of section 3746 of the Civil Code: Meriwether v. Bird, 9 Ga. 594, 597. By it any mutual demand between the parties existing at the commencement of the suit may be set off. Except in the case of dishonored notes (Civ. Code, sec. 3750), the debts need not be connected, need not grow out of the same transaction, need not have arisen in mutual dealings, and the debt sought to be so used need not originally have been due to the defendant. It is true that the ancient opposition to assignments of choses in action caused the courts long to lean to a construction which restricted the right so to use assigned claims. But it was finally conceded, because, otherwise, an insolvent might recover his demand, while the solvent defendant with a valid claim could get nothing except a judgment in the separate and independent suit he was forced to institute against the other party. The transferee of an account or other chose in action having the right to sue in his own name (Civ. Code, sec. 3077), the question as to how the claim arose is of little importance. If at the commencement of the suit each party has a cause of action of the same nature against the other in his [347] own name, and in the same capacity, one demand may be set off against the other. "For if the parties are mutually indebted, there are mutual debts." They do not ipso facto extinguish one another, as at the civil law; for the defendant must plead his setoff in bar; but where this is done and the claim is established the result, in some degree, relates to the condition existing at the time of filing the suit, and in effect determines that the two claims had canceled each other by operation of law, and

that when the suit was filed the real cause of action was for the difference after balance struck: Meriwether v. Bird, 9 Ga. 597; State v. Brobston, 94 Ga. 95, 47 Am. St. Rep. 138, 21 S. E. 146; Wagoner v. Paterson Gas Co., 23 N. J. L. 283; Fennell v. Nesbit, 16 B. Mon. 351; Richardson v. Parker, 2 Swan, 529.

Assignees, trustees in bankruptcy, and receivers are not purchasers for value, and take the estate of the insolvent subject to all setoffs, liens, and encumbrances, and in the plight existing at the date to which his title is ultimately referred: Powers v. Central Bank, 18 Ga. 658; Georgia Seed Co. v. Talmadge, 96 Ga. 255, 22 S. E. 1001. It may work an inequality in this case, but the assignment, having been declared to be void, is to be ignored except in so far as it affects the question of notice of insolvency. After it was set aside, if no receiver had been appointed it would not have deprived Nix of his right of setoff had he been sued by the bank. The written transfer of the account made him creditor and the bank his debtor; he could at once have brought suit thereon in his own name (Civ. Code, sec. 3077; Mordecai v. Stewart, 37 Ga. 379 (6); Loudermilk v. Loudermilk, 93 Ga. 443, 21 S. E. 77), with the privilege of securing liens by garnishment or attachment, or, unless prevented by some statute, he might have obtained from his debtor a preference by mortgage, collateral or otherwise. He also had the fixed and vested right of setoff whereby in effect his debt to the bank was canceled, paid off and discharged, and the bank's debt to him was satisfied to the extent of their concurrence. And relying on this right he may have failed to resort to others which would have equally availed him, and caused the same result to the other creditors. The bank really had no asset in its claim against Nix. It was as worthless as a note to which a valid plea of payment could have been interposed. If the bank had continued a going concern, it is evident that this debt from Nix was not a source from which it could pay creditors generally, nor was it available in any manner, [345] except as a credit on the account formerly due to Hines. If it was not an asset in the hands of the bank prior to filing the petition, it surely did not become such when a receiver was appointed. And so, it has been held, "in cases of cross-indebtedness, the assets of the bank consist only of the balance of the accounts. That is all the fund which the bank itself would have had to satisfy its creditors, in case no receiver had been appointed. And there is no equality and no equity in putting

a debtor of the bank who has a just and legal setoff as against the corporation, in a worse position, and creditors in a better position, by the failure of the bank and the appointment of receivers": Wagoner v. Paterson Gas Co., 23 N. J. L. 283. In Fennell v. Nesbit, 16 B. Mon. 351, it was ruled that the balance which remains after the setoff is deducted is all that is actually due to the estate, and which can be rightfully and justly applied in the course of administration: See, also, Richardson v. Parker, 2 Swan, 529.

But it is claimed that even if a defendant has a general right to buy and set off when sued by a receiver, it ceases as soon as the corporation becomes insolvent; that otherwise one with knowledge of the insolvency can obtain a preference and an unjust advantage over others equally entitled to share in the estate. And these reasons have appealed so strongly to many legislative bodies that some have prohibited setting off claims assigned after the act of insolvency: Scott v. Armstrong, 146 U. S. 499, 511, 13 Sup. Ct. Rep. 148; Davis v. Knipp, 92 Hun, 297, 36 N. Y. Supp. 705; Venango Bank v. Taylor, 56 Pa. St. 14. Others deny this privilege to claims purchased within four months prior to the filing of a petition in bankruptcy: Bankruptcy Act 1898, sec. 68 b. If the title of the receiver had related to the fact of insolvency, or to the act of insolvency, or to the date of the assignment or closing of the bank's doors, the result here would be different. But whatever the test, there will always be hard cases and transactions close to the dividing line, which might well have been put within the rule. But had they been so included it would only have shifted the line of division, and hard cases close to the new would in turn call for another enlargement. The right of setoff is one given by a definite law, and can only be destroyed by law. There must be some fixed rule, not one which varies and departs from the straight course in order to take in exceptional cases. In the absence of a statute the filing of the petition for the appointment of [349] a receiver closes the right to purchase claims and use them by way of setoff when sued by that officer: Moise v. Chapman, 24 Ga. 249; Colt v. Brown, 12 Gray, 233; Ogden v. Cowley, 2 Johns. 273. Compare Civ. Code, sec. 2719. At that moment the rights of creditors attach; it ceases to be a going concern; the assets are impressed with a trust for the benefit of all alike. Prior thereto the privilege of buying claims to be used as a setoff continues, even though the assignee may know of the insolvency. The right exists up to the prohibited

date. The principle is the same, whether death, the fact of insolvency, the act of insolvency, act of bankruptcy, or filing the bill be the determining period. Under the Civil Code, section 3751, claims purchased after the death of the intestate cannot be set off in a suit by an administrator; but if A is indebted to B, and B is sick unto death, and insolvent, there is nothing in the sickness and insolvency to prevent A from purchasing a claim which C holds against B before the latter's death; and in a suit by the administrator of B a setoff of such debt would clearly be allowed. So, too, if A is indebted to a corporation, and the company is financially sick and approaching corporate death, he may use as a setoff claims purchased at any time up to the date when the rule or statute interferes and destroys the privilege. It will not do to extend the rule beyond the statute, though the reason thereof may apparently be equally applicable to cases outside of its terms; for what is sufficient to induce a legislature to make law will not authorize courts to change law.

Among the very first decisions on the subject is that of Dickson v. Evans, 6 Term Rep. 57, decided by Lord Kenyon in 1794, where he held that in a suit by the assignee the defendant could not set off notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless the defendant showed "that such notes came to his hands before the bankruptcy." "The assignee shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. This is the justice of the case." And Grose, J., concurring, stated that "one object of the act was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending that he was a creditor at the time of the bankruptcy." [350] A fuller and more recent decision with a review of many of the authorities is that of Stone v. Dodge, 96 Mich. 514, 56 N. W. 75, where the court reached a similar conclusion, under the Michigan act declaring void transfers either after the commission of an act of insolvency or in contemplation thereof with a view to prevent the application of the assets in the manner prescribed: See McLaren v. Pennington, 1 Paige, 102; Pennsylvania Bank v. Farmers' Bank (Pa.), 20 Atl. 150; Clark v. Brockway, 3 Keyes, 13; Lanier v. Gayoso Bank, 9 Heisk. 506. A case directly in point is Moseby v.

Williamson, 5 Heisk. 278. There a certificate of deposit in a bank was assigned by J., the holder, to W., a debtor of the bank, after the suspension and closing of the doors, but before the filing of the bill for winding up its affairs as an insolvent corporation. It was held that the certificate was a valid claim of setoff in favor of W. against a debt due by him when sued by the receiver. In Hawkins v. Whitten, 10 Barn. & C. *217, under the English bankrupt act by which mutual debts and credits might be set off provided the party claiming the setoff had not notice of the act of bankruptcy, it was held, in an action by the trustee of certain bankers, that the defendant had the right "to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew they had committed an act of bankruptcy." In the opinion Bailey, J., says: "Notice of an act of bankruptcy is alone the criterion or dividing point. . . . . It may be true, and is, that he took these notes for the very purpose of making them the subject of his setoff, and of getting, in substance, twenty shillings in the pound upon these notes; but as this is not prohibited we cannot say it is illegal." In Dickson v. Cass, 1 Barn. & Adol. *343, in an action by the assignee of certain bankers, it was held that a party had the right to set off the notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that any of the partners constituting the banking-house had committed an act of bankruptcy. The right of setoff exists as to mutual debts at any time before the person became bankrupt: See Cook v. Cole, 55 Iowa, 70, 7 N. W. 419; Aldrich v. Campbell, 4 Gray, 284.

It will be found that the decisions holding that claims purchased after knowledge of insolvency cannot be used by way of setoff are based on the language of a statute. The Louisiana cases are controlled by the principles of the civil law and the code of that state. [351] Smith v. Hill, 8 Gray, 572, is apparently in conflict with Aldrich v. Campbell, 4 Gray, 284, and Colt v. Brown, 12 Gray, 233, in so far as the general rule is concerned, though the facts there were very peculiar. A bought B's stock of goods with the understanding that the purchase money notes should be placed in the hands of a third person in trust for the payment of these creditors. Afterward A bought up claims against B and sought to use them as a setoff against these notes, which by his own act and the agreement of the parties had been impressed with a trust in favor of creditors. It is manifest that his claim of setoff should not

have been allowed. In Clark v. Brockway, 3 Keyes, 13, the debtor had made an assignment. The defendant gave his note to the assignee. The assignment was subsequently set aside and a receiver appointed, who sued Brockway on the notes formerly given to the assignee. After the commencement of the proceedings to appoint a receiver Brockway became the owner of a note made to the assignor, and sought to use the same as a setoff in the suit brought by the receiver. The court held that this could not be done. On the facts it is apparent that that case is not in conflict with the Tennessee and English cases above cited.

There is nothing in this record which shows that such will be the fact, but we cannot shut our eyes to the fact that under the law inequalities may result, and one creditor may frequently obtain an advantage of others in the distribution of insolvent estates. Inequalities and hardships might likewise result if the law were different from that now of force. With these consequences, however, we cannot be concerned, and, as was said in the almost identically similar case of Hawkins v. Whitten, 10 Barn. & C. *217, as the purchase and setoff are "not prohibited by law, we cannot say it is illegal."

Judgment reversed. By five justices.

Setoff.—Demands which may be the subject of a setoff are considered in the monographic note to Gregg v. James, 12 Am. Dec. 152-157. And setoff after insolvency is discussed in the monographic note to St. Paul etc. Trust Co. v. Leck, 47 Am. St. Rep. 578-595. In this note the right of setoff against banks and receivers is considered. A reference to page 582 thereof will show the authorities on the right to purchase a claim, with knowledge of insolvency, to use as a setoff.

OBER & SONS COMPANY v. COCHRAN.

[118 Ga. 396, 45 S. E. 382.]

TRUST FUND—Right to Follow.—To Recover a trust fund which has been misapplied by the trustee, it must be clearly identified or distinctly traced into the property, fund, or chose which is to be made subject to replace it; when it has been dissipated and can be traced no further than into the hands of the trustee, it is lost, and he who was its owner stands upon no better footing than a general creditor, when the assets of the trustee are being distributed by a court of equity. (p. 121.)

BANKING—Money Collected, Right to on Insolvency.—If a bank to which a note is sent for collection, instead of remitting the proceeds as instructed, uses them in its business, the assets of the bank, in the hands of a receiver, upon its insolvency, are not impressed with a trust for the payment of the money so collected and used. (pp. 118, 126.)

Hall & Wimberly, for the plaintiffs.

Allen & Tissinger, for the defendant.

397 FISH, P. J. G. Ober & Sons Company held a note on P. F. Matthews, of Pike county, for five hundred and six dollars, which fell due on November 1, 1901; and on October 14, 1901, sent his note to the New South Savings Bank, of Barnesville, Georgia, for collection and remittance of the proceeds. On November 21, 1901, the bank collected the amount due on the note from Matthews. The bank never remitted the amount so collected to the Ober company, but used the same in its own business. On December 4, 1901, the bank failed. Upon the application of creditors, its assets were placed in the hands of a receiver. The Ober company filed a petition against the receiver, in which, after setting up the facts in reference to its claim against the bank, it alleged that it was not a creditor in the sense that it had extended credit to it, either by making a deposit or by a loan of money, or otherwise; that the money collected from Matthews was the property of the petitioner, and not an asset of the bank. The petitioner prayed for an order requiring the receiver to pay over to it the amount so collected. The receiver alleged in his answer that when he took charge of the bank he found only twenty-nine dollars and fifty-two cents in its vaults. He denied that the petitioner had any superior lien on the funds in his hands. The case came on to be tried at the October term of Pike superior court. The petitioner proved the facts which it had alleged in its

petition, but made no effort to trace the money collected upon the Matthews note into any fund or property which went into the hands of the receiver. The court held that, under these facts, the Ober company was not entitled to an equitable lien on the funds in the hands of the receiver as against the general creditors of the bank, to which judgment the petitioner excepted.

Under the facts alleged and established by the evidence, did the petitioner have an equitable lien upon the assets of the bank in the hands of the receiver? We think not. Under the ancient rule the equitable right to follow and recover property misapplied by one holding it in trust for another depended upon the ability of the owner to identify it, the equity attaching only to the property itself. Subsequently the rule was extended, so that the equitable right would attach to the proceeds of the property, to whatever was obtained in exchange for it, the rule, as stated by Lord Ellenborough [398] in Taylor v. Plumer, 3 M. & S. 575, being that "the product or substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such." But if there were no means of tracing and identifying the specific property or its proceeds, the equitable right of the owner was lost. So that if a trust fund became mingled and confused with other funds, it could not be separated and recovered by the person injured by the misappropriation. Since the decision in the celebrated English case of Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, wherein Master of the Rolls Jessel laid down what he called "the modern doctrine of equity," the rule has been given a somewhat wider scope in England and in those jurisdictions in this country where the decision in that case has been followed. Indeed, in some of the American cases which have been decided since this leading English case, the courts have gone much further than the principle there laid down seems to authorize. In that case it was held: "If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and have a charge on the balance in the bankers' hands." The facts of the case, as stated by the master of the rolls, showed that Mrs. Cotterrill had deposited certain bonds with Mr. Hallett for safe custody, and he was in the habit of receiving the income from the bonds for her. Hallett improperly sold the bonds and put the money received to his general account at his bankers. Sir George

Jessel said: "It is not disputed that the money remained at his bankers mixed with his own money at the time of his death; that is, he had not drawn out that money from his bankers. In that position of matters Mrs. Cotterrill claimed to be entitled to receive the proceeds, or the amount of the proceeds, of the bonds out of the money in the hands of Mr. Hallett's bankers at the time of his death, and that claim was allowed by the learned judge of the court below, and I think was properly so allowed." The ruling of the court made Mrs. Hallett's claim a charge upon the fund in the bankers' hands with which her money, received from the sale of her bonds, had been mingled by her agent and bailee. The court proceeded upon the theory that a trustee who deposits trust funds, together with funds of his own, to his own account at his bankers, and then draws, for his own purposes, from this fund leaving a balance sufficient to cover the trust fund, is to be presumed to have drawn out his own money in preference to the trust money. The master of the rolls likened the facts of the case to a trustee putting one thousand sovereigns of trust money in a bag and then placing in the same receptacle a sovereign of his own; and then said: "Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take one thousand sovereigns out of that bag? I have no doubt of it." He further said it would make no difference if, instead of one sovereign, it was another one thousand sovereigns of his own which the trustee placed in the bag. But we apprehend that if at the time the effort was made to recover the trust funds they could be traced no further than into the bag and the bag was then empty—the trustee having spent all the sovereigns which he had put in it—the trust fund, even under the principle laid down in that case, would be lost, and the cestui que trust could not, as against general creditors of the trustee, take from the assets of his estate an amount sufficient to replace it.

In the case which we have under consideration the bank was the agent of the Ober company, and, as such agent, collected something over five hundred dollars, which it used in its business, and then failed and its assets were placed in the hands of a receiver; and the claim of the Ober company is that notwithstanding its failure to trace the money so collected into any property or fund which went into the hands of the receiver, it has the right to take from a fund which was not on hand when the bank failed, but which has been realized by the re-

ceiver by converting the bank's assets into cash, an amount equal to that which the bank so collected and spent. There is nothing in the noted English decision which sustains this contention, and it is contrary to the well-established principle applicable to cases of the present character and to the great weight of authority upon the subject. In order to recover a trust fund which has been misapplied by the trustee, or person holding it in a fiduciary character, it must be clearly identified or distinctly traced into the property, fund, or chose in action which is to be made subject to replace it. When the trust fund has been dissipated and can be traced no further than into the hands of the trustee, or agent who held it in trust, the fund is lost, and he who was its owner stands upon no better footing than a general creditor, [400] when the assets of the trustee or agent are being distributed by a court of equity. It is a wide and dangerous stretch of the equitable doctrine applicable to the tracing and recovering of trust funds to say that it is not necessary to trace the funds into any specific property or chose in action, but that if it can be shown that the funds somehow, in some unexplained way, went into the business of the trustee, all of his assets are forthwith impressed with the trust. Even upon the theory adopted by some courts that the tracing of the trust fund into the estate of the trustee is sufficient, it is difficult to see how mere proof that the trustee has used the fund in his own business is sufficient to show that it has gone into and, in some form, is a part of his estate. He may have made a bad investment with it and lost it completely. He may have paid debts with it; in which event the liabilities of his estate will have been decreased, but nothing will have gone into his assets as the representative or substitute for the fund so used.

In support of the contention that the Ober company is entitled to an equitable lien upon the fund collected by the receiver of the insolvent bank, the able and industrious counsel for the plaintiff in error cite a number of cases, among which is McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, where the principle for which counsel contend was first clearly formulated and announced. In that case Coyle, C. J., said: "We do not understand that it is necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee it is sufficient." This has been regarded and followed by some of the courts of this country as the leading

case upon "the modern doctrine of equity" in reference to tracing and reclaiming trust funds. In giving the reason upon which the ruling of the court was based, the learned chief justice said: "The conclusion is irresistible, from the facts, that the proceeds of the trust property found its way into Hodges' hands, and were used by him either to pay off his debts or to increase his assets. In either case, it would go to the benefit of his estate. It is not to be supposed the trust fund was dissipated and lost altogether, and did not fall into the mass of the assignor's property; and the rule in equity is well established that so long as trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust." Cassoday, J., with [401] whom Taylor, J., concurred, vigorously dissented from the judgment of the court, and, in reply to the reasoning of the majority, said: "It is probable, as claimed, that the draft, or the proceeds of it, were used by Hodges prior to the assignment in payment of some of his debts. But this would in no way swell the volume or value of his assets which went into the hands of the assignee. It would merely diminish the amount of his indebtedness to the extent of such payment. That would, in a general way, benefit the estate to the extent that it increased the per cent that the other creditors would in consequence receive. But as this estate is badly insolvent, the aggregate amount of such increase would necessarily be very much less than the amount of the draft. The amount of the equitable charge upon the assets ought not, upon any principle of equity, to exceed the amount of the benefit to the estate derived by the draft or its proceeds." Chief Justice Corliss, in Northern Dakota Elevator Co. v. Clark, 3 N. Dak. 30, 31, 53 N. W. 176, disposes of the line of argument adopted by the majority of the Wisconsin court, and some other courts which have rendered similar decisions, in the following convincing manner: "A new doctrine has sprung up in recent days. It goes upon the theory of the enrichment of the estate out of which priority is sought to be secured. This would entitle every general creditor to preference, and therefore there would be no preferences as between such creditors and the person whose property, without his consent, had enriched the estate. Reasoning along this line, we would have a preference in favor of general creditors as against one who by a tort had caused a liability against his estate without enriching it, as in case of assault and battery, libel, slander, seduction, or malicious prose-

cution. But no such preference exists; nor can it exist." On the same line, Mr. Justice Jackson, in Commercial Nat. Bank v. Armstrong, 39 Fed. 693, said: "No well-considered case has gone to the extent of holding that when an agent converts or misappropriates his principal's property or fund, and thereafter fails, his general estate will be impressed with a trust for the reimbursement of such principal on the ground that such estate has been benefited, and to an equal amount, by the agent's breach of duty. Every creditor could rest a like claim to priority of satisfaction on the same ground. The right of the owner to follow and recover his property rests upon a principle altogether different. He can only recover such portion [402] or proceeds as can be traced into the hands of the receiver in its original form or in some substitute form."

The decision in McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, has met with much adverse criticism by other courts and by writers upon legal topics, who have regarded it as a dangerous and unauthorized departure from established and correct equitable principles, and has been, together with the two other Wisconsin cases which followed it, expressly overruled. The reviewing and overruling decision was rendered in Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, where the court held: "One for whom a banker had collected a draft before making a voluntary assignment is not entitled to a preference over other creditors if the proceeds of such collection were disposed of by the banker prior to the assignment, so that no part thereof came in any form to the hands of the assignee. McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, Francis v. Evans, 69 Wis. 115, 33 N. W. 93, and Bowers v. Evans, 71 Wis. 133, 36 N. W. 629, so far as they conflict herewith, overruled." Carley v. Graves, 85 Mich. 483, 24 Am. St. Rep. 99, 78 N. W. 710, distinctly followed McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, which the court said covered the principle to be applied to the case which it had under consideration. In a later Michigan case, the decision in which does not throw much light upon the subject which we have under consideration, the court, in discussing the right to follow trust funds, after citing cases holding that there must be a tracing or identification of the fund, said: "But in all these cases it is held that the fund must be clearly traced into the hands of the person sought to be charged, and that if the trust property does not remain, but has been made way with by the

trustee, the cestuis que trustent have no longer any specific remedy against any part of his estate in his insolvency, but they must come in pari passu with the other creditors, and prove against the trustee's estate for the amount due them. This rule has been as steadily adhered to by the courts both of this country and of England as any rule which has ever been adopted for the protection of the general creditors of a bankrupt or of an insolvent": Sherwood v. Milford State Bank, 94 Mich. 81, 53 N. W. 924. The case of People v. City Bank of Rochester, 96 N. Y. 32, which is cited by counsel, and which has been construed by some of the courts as being in line with McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, is not so considered by the court of appeals of New York. In Matter of Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504, it was held: "Upon an accounting in bankruptcy [403] or insolvency, a trust creditor is not entitled to preference over general creditors of the insolvent merely on the ground of the nature of the claim. To authorize such a preference some specific recognized equity founded on some agreement, or relation of the debt to the assigned property, must be shown, which entitles the claimant, according to equitable principles, to preferential payment. To entitle the trust creditor to such a preference, it must at least be made to appear that the fund or property of the insolvent, remaining for distribution, includes proceeds of the trust estate." The court further said: "The case of People v. City Bank of Rochester, 96 N. Y. 32, seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general funds of the bank, or that they had not passed in some form to the receiver. The court did not decide that the petitioners would have been entitled to a preference in case the proceeds of the check had been used by the bank and were not represented in its assets in the hands of the receiver." In Holmes v. Gilman, 138 N. Y. 369, 34 Am. St. Rep. 463, 34 N. E. 205, Peckham, J., who delivered the opinion, speaking of the right to follow a trust fund, said: "The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing the original fund. The

right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title."

It seems to us that the courts which, in our opinion, have enlarged the equitable doctrine applicable to cases of the present character to an unreasonable extent, have lost sight of this basic idea of equitable title to the property into which the trust funds are traced—that is, title to the extent that such funds have entered into such property. The other cases cited by counsel for plaintiff in error are: Thompson v. Gloucester City Sav. Inst. (N. J.), 8 Atl. 97 (a case decided by the court of chancery of New Jersey); Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; Peak v. Ellicott, 30 Kan. 156; 90 Am. Rep. 90, 1 Pac. 499; People v. Bank of Dansville, 39 Hun, 187; First Nat. Bank v. Sanford, 62 Mo. App. 394; Germania Fire Ins. Co. v. Kimble, 66 Mo. App. 370. These cases tend to support [404] the contention of the plaintiff in error, especially the two Missouri cases, which are directly in point. In the first of these Missouri cases, the court, referring to the reasoning in Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571, the decision in which was considered controlling, said: "We concede that this reasoning proceeds on advanced lines, and is seemingly opposed to the weight of authority in other states." In our investigation of the subject we have found some other cases which are in line with these, but, for the reasons which we have given, we do not consider any of them sound. In an elaborate monographic note to Sayles v. Cox, 32 L. R. A. 719, it is said: "The general rule, where the bank has completed the collection and mixed the funds with its own, is that the bank is no longer a trustee but simply a debtor, and that the owner of the paper cannot claim a preference out of its assets." In that case the supreme court of Tennessee held: "The fraud of a bank in receiving a note for collection when insolvent will not alter the rule that collections made under directions to remit 'by draft' will not be impressed with a trust giving a preferential claim against the bank's assets."

In Merchants' Bank v. Austin, 48 Fed. 31, it was held that a bank which collects a draft sent it for that purpose, with directions to remit the proceeds to another bank for the owner's account, does not thereby become a trustee, so that the fund can be followed into the hands of a receiver, although it had become mixed with other cash of the bank before his appointment; "especially when it appears that the business was

carried on, and money paid out, for several days after the collection was probably made." In Philadelphia Nat. Bank v. Dowd, 38 Fed. 172, it was held, that if a paper is sent to a bank for collection and immediate remittance, but the collecting agent, instead of obeying instructions, collects the money due on the paper and mingles it with its own funds before it closes its doors, the fund so collected cannot be followed, but the collecting agent is merely a general debtor of the owner of the paper. In that case there is a fine and full discussion of the subject and the cases pro and con by Judge Seymour. To the same effect as the case just cited is Bank of Commerce v. Russell, 2 Dill. 215, Fed. Cas. No. 884. The supreme court of Alabama held: "The mere fact that a bank, as agent, has converted to its own use the money of its principal, which it failed to account for, [405] and commingled it with its own money, or in some form with its other assets, so that it cannot be identified, or the specific uses to which it was applied traced, is not sufficient, on a bank becoming insolvent, to impress the general assets of said bank with a trust for the payment of the money so collected and used." Similar rulings were made in Anheuser-Busch Brewing Assn. v. Clayton, 56 Fed. 759, 6 C. C. A. 108; Edson v. Angell, 58 Mich. 336, 25 N. W. 307; Illinois Trust etc. Bank v. First Nat. Bank, 15 Fed. 858; Spokane County v. First Nat. Bank, 68 Fed. 979; Ferchen v. Arndt, 26 Or. 121, 46 Am. St. Rep. 603, 37 Pac. 161; Muhlenberg v. Northwest Loan Co., 26 Or. 132, 38 Pac. 932; Thompson's Appeal, 22 Pa. St. 16; Union Bank of Chicago v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119, 27 N. E. 907; Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497; Steamboat Co. v. Locke, 73 Me. 370; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Neely v. Rood, 54 Mich. 134, 52 Am. Rep. 802, 19 N. W. 920; Shields v. Thomas, 71 Miss. 260, 42 Am. St. Rep. 458, 14 South. 84.

The case of Tiedeman v. Imperial Fertilizer Co., 109 Ga. 661, 34 S. E. 999, is on its facts closely analogous to the present case, and the decision there rendered would be conclusive of the question which we have had under consideration, but for the fact that the equitable doctrine in reference to the tracing and recovering of trust funds, or funds held in a fiduciary character seems to have been only incidentally dealt with, the case turning mainly upon the question whether the parties claiming the equitable liens upon the assets of their insol-

vent bailees were entitled to sue of authority
of the Civil Code, upon which the creditor
tentions. It was there held: "W er, held
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solvent." In the course of the opinion, however, MR. J. LITTLE made some observations which are directly applicable to the question involved in this case. He said: "A trust may arise in different ways. If one uses the funds of another in the purchase of property, taking title thereto in his own name, as a general rule it will be held that the purchaser holds the property thus acquired in trust for the benefit of the owner of the funds. Such is known as a resulting trust, which is 406 sometimes spoken of as an equitable lien, and while it is, the lien extends no further than the property acquired with the money of the other. Such a lien can only be enforced against the specific property in which the funds were invested." He further said that the facts created an agency, and that the principals could have recovered a judgment against the agents for the money collected, "in a suit as for a debt, or, had they been able to identify the particular funds, separate and apart, they could have recovered the specific funds."

The trial court correctly held that the petitioners were not entitled to an equitable lien upon the assets in the hands of the receiver of the insolvent bank.

Judgment affirmed. By five justices.

Banks as Collection Agencies are discussed in the monographic note to Minneapolis etc. Co. v. Metropolitan Bank, 77 Am. St. Rep. 613-629. And the right to recover money collected by a bank, upon its insolvency is discussed in the monographic note to Plano Mfg. Co. v. Auld, 86 Am. St. Rep. 775-807.

The Right to Follow Trust Funds when they have been misapplied by the trustee is discussed in the monographic notes to Ferchen v. Arndt, 46 Am. St. Rep. 608-610; Union Nat. Bank v. Goetz, 32 Am. St. Rep. 125-130. And consult, also, the subsequent cases of State v. Foster, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 826; Midland Nat. Bank v. Brightwell, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994.

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ARMOUR PACKING COMPANY v. CITY COUNCIL OF AUGUSTA.

[118 Ga. 552, 45 S. E. 424.]

TAXATION—Choses of Foreign Corporation, Situs of.—Notes, accounts, and other choses in the hands of an agent of a foreign corporation doing business in a city, which have been received in the course of such business, are taxable by the city, it having statutory authority to tax property of every character within its limits. (p. 131.)

C. H. Cohen, Boykin Wright and Felder & Rountree, for the plaintiff.

William H. Barrett, for the defendant.

553 COBB, J. The Armour Packing Company, a corporation chartered under the laws of the state of New Jersey, had a place of business in the city of Augusta, with a manager to whom it ships meats to be sold, and the amounts realized from the sale of such meats are remitted daily to the packing company at Kansas City, Missouri, none of the money being invested in the city of Augusta. The packing company's branch at Augusta does business on credit as well as for cash, and in January, 1900, had upon its books in Augusta notes, accounts, and choses in action received from the sale of meats and other products, amounting to six thousand dollars. The question is whether the city of Augusta has power to levy a tax upon debts due the corporation such as these notes, accounts, and choses in action. The facts of this case are substantially the same as those in Armour Packing Co. v. Savannah, 115 Ga. 140, 41 S. E. 237, where 553 it was held that the money and solvent accounts due the corporation were taxable in Savannah. A careful examination of the opinion shows that the decision was based upon the rule thought to be applicable under general principles of law, and also upon a section of the charter of Savannah which was construed to confer the power to tax. It is therefore to be seen that the exact question has been decided by this court. We have been requested to review and overrule that decision, or, at least so much of it as held that the city of Savannah had authority to levy the tax under principles of general law. We are of opinion, however, that the decision is sound, and decline to overrule it.

It is to be conceded that by the decided weight of authority the general rule is that debts follow the person of the creditor and are to be taxed at his domicile. This court, however, held in an early case that, for purposes of taxation, the situs of a debt is the place where the debtor resides: Bridges v. Griffin, 33 Ga. 113. In that case it was sought to tax notes owned by a resident of this state, due by persons residing without the state. Such notes and other evidences of indebtedness are now taxable by express statute: Pol. Code, sec. 776; Collins v. Miller, 43 Ga. 336; Cary v. Edmondson, 44 Ga. 651; City Council of Augusta v. Dunbar, 50 Ga. 387. These cases have little bearing on the question now in hand. It is conceded, of course, that tangible personal property is taxable wherever it is situated, and that for purposes of taxation the maxim that personal property follows the owner does not apply. It is claimed, however, that it does apply in all cases to intangible personal property, such as notes, bonds, accounts, etc. We do not agree that this is a universal rule even as applied to that class of property, and we are not, as was suggested by the able counsel for the plaintiff in error, alone in this opinion. Courts of high standing and ability have held that the situs of negotiable instruments for purposes of taxation is at the place where they are actually situated, without regard to the residence of the owner: See 25 Am. & Eng. Ency. of Law, 2d ed., 147; Wilcox v. Ellis, 14 Kan. 588, 603, 19 Am. Rep. 107; Fisher v. Commissioners, 19 Kan. 414; People v. Gardner, 51 Barb. 352, 357-359, and cases cited; People v. Trustees, 48 N. Y. 397; Catlin v. Hull, 21 Vt. 152; In re Jefferson, 35 Minn. 215, 28 N. W. 256; People v. Home Ins. Co., 29 Cal. 533; Poppleton v. Yamhill County, 18 Or. 377, 23 Pac. 253; Taylor v. County Court, 47 Mo. 594; Redmond v. Commissioners, 87 N. C. 122.

554 The reasoning upon which these decisions is based would make them applicable to other species of intangible property than negotiable securities. They proceed upon the ground that wherever property is actually situated and receives the protection of the laws, it is subject to taxation, whether tangible or intangible. The ground upon which we rest our decision in this case is, that when a nonresident goes into another state for the purpose of doing business, and employs an agent there to transact his business, receive money due him, contract debts for him, purchase property to be used in the business, and exercise a general management of such business, he cannot escape

the burden of taxation which his property of every description situated in this state ought to bear, by invoking the fiction that intangible property has its situs where the owner resides. It is just and fair that the state which affords his property protection should have a right to lay upon it its proportionate burden of taxation. This fiction has no application in matters of taxation, at least in such a case as is presented in this record. To all intents and purposes these notes and accounts are a part of the business being conducted in Augusta. They were received in the course of that business and represent part of the capital employed in the business. They are, in short, as much taxable as is the tangible personal property actually employed in the conduct of the business in that city. These views are based upon sound reasoning, good sense, as well as the principles of common justice, and are not without authority to support them; nor are they necessarily in conflict with the rule that the situs of a debt is, generally, at the place where the creditor resides. Mr. Desty lays down the following rule: "The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner, the only exception being where the property is employed in business, or is in the hands of an agent of the owner having an actual situs different from the domicile of the owner. It is not necessary, therefore, that the owner should reside within the state, to render his personal property situated within the state liable to taxation": 1 Desty on Taxation, sec. 67, p. 322.

In Redmond v. Commissioners, 87 N. C. 122, it was held: "Personal property of a nonresident (here notes secured by land) held by his agent in this state is subject to tax here. The legal fiction [555] that it is deemed to follow the person of the owner has no application to questions of revenue." We quote the following from the opinion of Ruffin, J.: "The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds; and so far as they have any substantial existence, they are in this state and not elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicile. It is but just, therefore, that they should contribute toward the support of the only government which affords them protection, and help to defray the expenses incurred in so doing. The actual

situs and control of the property within this state, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged, that it is deemed to follow the person of the owner, and to be present at the place of his domicile, has no application. In such case, the maxim 'Mobilia personam sequuntur' gives way to the other maxim 'In fictione juris semper æquitas existat.'" In People v. Home Ins. Co., 29 Cal. 533, it was held that bonds in the hands of an agent or trustee of a nonresident owner were taxable by the state in which the agent resided. In the case of Adams Exp. Co. v. Ohio, 166 U. S. 186, 17 Sup. Ct. Rep. 604, the question arose as to the right of a state to tax the franchise of a foreign corporation doing business within the state. It was held that the capital stock of a corporation represents not only its tangible property, but also its intangible property, including corporate franchises, contracts, privileges, and the goodwill of the concern; and that when the tangible property of a corporation is scattered through different states by means of which its business is transacted in each, "the situs of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done. No finespun theories about situs should interfere to enable these large corporations, whose business is of necessity carried on through many states, from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires." See the opinion on pages 223-225, where it is said that the maxim "Mobilia [556] personam sequuntur" was never of universal application, and seldom interferes with the right of taxation: See, also, Judson on Taxation, sec. 258; Burroughs on Taxation, 60; 25 Am. & Eng. Ency. of Law, 1st ed., 146; Buck v. Miller, 147 Ind. 586, 47 N. E. 8, 62 Am. St. Rep. 436, and notes on pp. 455-457; notes to Boyd v. Selma, 16 L. R. A. 731, 732; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. Rep. 585; New Orleans v. Slempel, 175 U. S. 309, 20 Sup. Ct. Rep. 110.

This view of the matter makes it unnecessary to determine whether, independently of the principle above announced, the city of Augusta had legislative authority to tax notes and accounts due the Armour Packing Company. The city manifestly has authority to tax property of every kind and character situated within its limits, and these notes and accounts of the plaintiff we hold, under the facts of this case, to be personal

property having a situs in Augusta for purposes of municipal taxation, and, as we have shown above, the exercise of this right is not only manifestly just, but is also not without judicial precedent. There is nothing in the ruling now made which conflicts with the decision in Trustees v. Augusta, 90 Ga. 634, 17 S. E. 61. In that case there were several trustees of a fund. Some of them resided in the city of Augusta and others resided in the county of Richmond outside the city. No business of any character was carried on or attempted by any of these trustees in or outside the city, or by anyone in their behalf.

The right of this state or one of its subordinate political divisions to tax all the intangible property of a person resident in this state or a domestic corporation, at the place of residence of such person or the principal office of such corporation, is not involved in this case.

Judgment affirmed. By four justices.

Lamar, J., disqualified.

The Situs of Personal Property for the purpose of taxation is discussed in the monographic notes to Buck v. Miller, 62 Am. St. Rep. 448-477; City of New Albany v. Meekin, 56 Am. Dec. 523-537; the taxation of foreign corporations in the monographic note to Phoenix Ins. Co. v. Commonwealth, 96 Am. Dec. 338-345; and the taxation of credits in the monographic note to People v. Worthington, 74 Am. Dec. 93-96. The situs of personal property and choses, for the purpose of taxation, does not always or necessarily follow to the domicile of the owner: Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; Hall v. American Refrigerator Co., 24 Colo. 291, 65 Am. St. Rep. 223, 51 Pac. 421. Compare Liverpool etc. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 72 Am. St. Rep. 483, 25 South. 970. Notes and securities of a principal remaining in the hands of his agent in one state, to enable the latter successfully to carry on the business of the principal, are taxable in that state, although he may have established his domicile in another state: Matzenbaugh v. State, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546. But credits of a foreign corporation payable at its home office where they are subject to taxation, cannot be taxed in another state: In re Union Tank Line Co., 204 Ill. 347, post, p. 221, 68 N. E. 504.

LANGLEY v. AUGUSTA.

[118 Ga. 590, 45 S. E. 486.]

MUNICIPAL CORPORATION—Territorial Limit of Power.—As a rule, a municipal corporation cannot purchase and hold real estate, or lawfully perform any acts, beyond its territorial limits, unless the power so to do is expressly given by the legislature. (p. 136.)

MUNICIPAL CORPORATION—Sewerage Beyond City Limits. A municipal corporation may acquire land, and make contracts to construct works, beyond its corporate limits, for the discharge of sewage and drainage, when necessary or manifestly desirable. (p. 136.)

MUNICIPAL CORPORATION—Sewer Irregularly Constructed. If a municipal corporation has authority to construct a drain and sewer beyond its corporate limits, an irregular exercise of such authority will not prevent liability from attaching for injuries occasioned to an individual by the drain or sewer. (p. 139.)

MUNICIPAL CORPORATION—Sewer, Negligence in Respect to.—If a municipal corporation negligently constructs a system of sewerage or drainage, or negligently maintains one properly constructed, so as to injure private citizens or their property, it is liable for the injury occasioned. (pp. 139. 140.)

MUNICIPAL CORPORATION—Sewer, Negligence as to—Measure of Damages.—If the nuisance caused by the negligent construction or maintenance of a system of sewerage is not of a permanent character, but such as the city may at will abate, and when abated the injury occasioned by it will cease, the plaintiff can recover merely the damages sustained within the period of limitations; but if the nuisance is of a permanent and continuing character, he may recover in one action all damages, both past and future, resulting therefrom. (p. 140.)

MUNICIPAL CORPORATION—Sewer, Damages When Properly Constructed.—In the case of a permanent injury to the freehold, resulting from the proper construction and maintenance of a work of public improvement, the measure of damages is the difference in market value before and after the injury. (p. 140.)

MUNICIPAL CORPORATION—Drain, Negligence as to—Elements of Damage.—If a city constructs or maintains a ditch or drain so as to make a nuisance, a private owner of property may recover for the caving in of his land, the loss in rental value, the expense of building bridges, and damages sustained from sickness. (p. 141.)

MUNICIPAL CORPORATION—Presentation of Claims Against.—A statute which requires those having claims against municipal corporations for injuries to present them in writing to the governing authority for adjustment, stating the time, place, and extent of the injury, as near as practicable, and the negligence which caused it, before suing therefor, does not require the notice to be drawn with the technical nicety of a declaration; a substantial compliance with the statute is sufficient. (p. 142.)

MUNICIPAL CORPORATION—Notice of Claim, Petition Need not Follow.—Where a claim for injury has been made in writ-

ing against a city in response to the demands of a statute, the petition, in an action to recover for such injury, need not exactly follow the notice, and an immaterial variance between the two as to the time, place, or extent of the injury does not amount to a fatal variance. (p. 143.)

MUNICIPAL CORPORATION—Prescriptive Rights in Streets. Title to a public street cannot be acquired by prescription; neither can a right to have obstructions for carrying off surface water remain in an unchanged condition, be so acquired. (p. 143.)

E. H. Callaway and E. C. Dunbar, for the plaintiff.

William H. Barrett, for the defendant.

[502] COBB, J. Langley is the owner of three lots with houses thereon located just south of Turknett Springs road, which is either in or near the city of Augusta. He brought suit against the city for damages, and in his petition alleged: When plaintiff bought the property above referred to there was a small ditch between Turknett Springs road and the property, sufficient to carry off all the water which from time to time fell or accumulated in that locality, or to which the drain was subject from its adjacent natural watershed. After plaintiff bought and entered into possession of the property, the city constructed a large ditch between his property and the road, and also built a sewer or culvert to connect this ditch with another large ditch running in a different direction, the effect of which was to divert the water which flows into the ditch last mentioned, through the culvert, into the ditch which had been built in front of plaintiff's property. This latter ditch was left opened, uncovered, exposed, without curbing or supports, and without any protection whatever against caving, widening, [503] or washing. As a result of this action of the city water remains in the ditch all the time, becoming stagnant and rendering the premises of plaintiff sickly and unhealthy. During heavy rains the ditch is not large enough to carry off all the water which flows into it, though before the culvert was constructed and the water from the other ditch thereby diverted the drain in front of plaintiff's property was amply sufficient at all times to carry off and properly drain all the water which came into it. Now the ditch frequently overflows the yard and premises of plaintiff, keeping the same constantly damp and wet, rendering the premises muddy and sloppy and sickly and unhealthy. The ditch has been constantly caving and widening, causing a quantity of plaintiff's land to fall in, and causing the supports under the porch and front portion of his storehouse to fall in. The

construction and maintenance of the ditch has also greatly interfered with plaintiff's access to the Turknett Springs road, rendering necessary the construction of several bridges across the ditch; and the life of a number of shade trees which plaintiff planted in the inclosure on his premises near the road has been endangered. It is alleged in the petition that the construction and maintenance of the ditch constitutes a continuing nuisance. It is also alleged that the market value of plaintiff's property has been diminished more than one-half by the construction and maintenance of the ditch as above set out. Attached to the petition is a copy of a notice of plaintiff's claim for damages, which it is alleged was duly served upon the city before the suit was brought. In answer to the petition the city set up two defenses: 1. It is alleged that by the construction of the culvert or sewer connecting the two ditches the water was merely restored to its natural flow, and that no burden was placed upon the ditch in front of plaintiff's property that did not belong there naturally; 2. It is claimed that the work done by the officers and employés of the defendant was done outside of the limits of the city, and was for this reason ultra vires, and that the city is not liable for any injurious consequences resulting to the plaintiff therefrom. The case went to trial, and resulted in a verdict for the defendant; and plaintiff's motion for a new trial was overruled. To this he has excepted. The defendant excepts by cross-bill to the judgment overruling its motion for nonsuit.

594 1-7. Counsel for both sides addressed themselves in the argument in this court largely to the question as to whether the ditch which is the subject matter of the plaintiff's complaint is inside or outside the city, this being an exceedingly doubtful question under the laws relating to the boundaries of the city of Augusta. After a careful examination of the record and the law relating to the issues raised by the pleadings, we are convinced that this perplexing question need not be decided in this case. A municipal corporation being a governmental institution, designed to create a local government over a limited territory, the general rule is that such a corporation cannot purchase and hold real estate beyond its territorial limits or lawfully perform any act beyond such limits, unless the power to do so is expressly given by the legislature: Tiedeman on Municipal Corporations, sec. 201. See, also, City Council of Augusta v. Mackey, 113 Ga. 64, 66, 38 S. E. 339. There are sound reasons why this rule should not be extended to the construction of

drains and sewers or the acquisition of land for that purpose. Every consideration of propriety and oftentimes absolute necessity, demands that this should form an exception to the general rule. It should not be presumed, unless the language of the municipal charter or of some legislative act requires it, that the general assembly intended to restrict a municipal corporation to the use of land within its limits for the purpose of constructing drains and sewers. These corporations ought to be encouraged, if not absolutely required, to carry their sewage and surface water charged with decaying matter beyond their limits to a point where the lives and health of the inhabitants of the city and adjacent territory would not be injuriously affected by them. To say that a municipal corporation could not acquire land for this purpose beyond its limits, and that therefore it must discharge its sewage and drainage inside the city, would be equivalent to saying in many cases that it is the duty of a municipal corporation to discharge matter reeking with fetid odors and noxious gases in the very midst of its citizens. Such a suggestion is intolerable. Authority is not wanting to sustain the proposition above stated. The case of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601, is directly in point, it being there held that a municipal corporation has power unless prohibited by its charter or a statute, to make contracts and construct works beyond the corporate limits for the discharge of sewage, when such discharge [596] is necessary or manifestly desirable. This decision is cited by many of the text-writers with approval, some of them stating unqualifiedly in the text the rule laid down in the decision: See Tiedeman on Municipal Corporations, sec. 294; Elliott on Roads and Streets, sec. 468; 10 Am. & Eng. Ency. of Law, 2d ed., 247; 1 Dillon on Municipal Corporatons, sec. 446, p. 263, note; 2 Dillon on Municipal Corporations, 1333, note. See, also, Lester v. Mayor of Jackson, 69 Miss. 887, 11 South. 114; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Cochran v. Park Ridge, 138 Ill. 295, 27 N. E. 939. The case of Village of South Orange v. Whittingham, 58 N. J. L. 655, 35 Atl. 407, seems to be contra, but three judges dissented. In Phinizy v. Augusta, 47 Ga. 260, it was tacitly recognized that the city would, under general law, be liable for damages resulting from an act done outside of the city limits in connection with the drainage system of the city.

It is said, though, that this court is committed to the proposition that a municipal corporation cannot, without legislative authority so to do, lawfully construct a drain or sewer beyond its

limits; and the case of Loyd v. Columbus, 90 Ga. 20, 15 S. E. 20, is cited to sustain this contention. It does not appear from the report of the case, but the original record shows, that the ditch dug by the city of Columbus was a part of a system of drainage for the city. It was held that a declaration alleging that the mayor and council of a city had caused a deep ditch to be cut near, in, and upon the plaintiff's land outside the limits of the city, thereby causing his land and fence to fall and cave into the excavation thus made, was rightly dismissed on demurrer, because the acts of the city complained of were ultra vires, it having no power or jurisdiction over the land in question. We agree with counsel for defendant in error that this decision directly supports the general proposition which he lays down; and as there was no motion to have the case reviewed and overruled, it must be taken as decisive of the general question. It must therefore be determined whether, under the charter of the city of Augusta, the acts complained of by the plaintiff were wholly ultra vires, in the sense that no liability could attach to the city for their negligent performance, or for their proper performance when the property of the plaintiff was thereby taken or damaged. In 1880 the charter of the city of Augusta was amended in various particulars relating to the organization, duties, and powers of a board of health for the city: See Acts 1880-81, p. 365. That act provided as follows: "The said board of health shall have [596] control of the drainage and sewerage of said city, but no extended system of drainage or sewerage, requiring expenditures of money from the city treasury beyond the appropriation made for said board by council, shall be undertaken until the same shall have been submitted to, and received the sanction and approval of, the city council. When the said board and council shall have agreed upon a plan or system of drainage or sewerage, in the manner aforesaid, it shall be the duty of the municipal authorities to have said plans executed, and provide for the expenses of the same. The said board of health shall have full power and authority to inaugurate any system of drainage and sewerage that they may from time to time deem necessary for the improvement of the sanitary condition of Augusta, but before putting the same into operation it shall receive the approval and sanction of the city council; and they are further authorized and empowered, in order to perfect any system of drainage and sewerage determined upon, as aforesaid, to construct a canal or canals, drain or drains, from said city to the Savannah river, or such other

stream or streams as said board, in the exercise of a sound discretion, may determine, for the purpose of emptying said drain or drains." Manifestly, this act did not intend to restrict the board to streams inside the city for the purpose of obtaining an outlet for the city's drainage and sewerage. The city had that power already under the general provisions of its charter. The language of the act makes it plain that the board of health was to have authority to utilize streams beyond the city limits for the purposes indicated. If, therefore, the ditch and culvert which constitute the subject matter of the plaintiff's grievance had been constructed by the board of health under the general authority given by the act, by an expenditure of money within the regular appropriation, or with the approval of the council if the expenditure was beyond such appropriation, or if they were a part of an extended system of drainage inaugurated by the joint action of the two bodies, there could be little question that the city would be liable in damages to the plaintiff under his allegations.

The evidence shows, however, that the ditch was built by the city council, without the co-operation of the board of health; and that if that body had any connection at all with the construction of the culvert, it was in a very informal and irregular way. The construction of this ditch and culvert was at most only an irregular [597] exercise of an authority duly conferred. The act provides that when the council and board of health shall agree upon a plan or system of drainage or sewerage, the city authorities shall execute the plan and provide for the expenses of the same. The board of health is merely an agency or instrumentality of the city. The real purpose of the act was to give the city the authority to do this work, and to provide the method by which it was to be done, that is, an extended system of sewerage should be constructed only with the concurrence of both the city council and the board of health, but that ordinary work on the system existing should be done through the instrumentality of the board of health, requiring the approval of the city council only in cases where more than the regular appropriation was needed for that purpose. Now, if the city council, the supreme authority in the city, without the formal concurrence of the board of health, actually constructs itself a ditch or drain outside the city, as a necessary and proper part of its system of drainage and sewerage, or if it uses one so constructed in such an irregular way, it by such use ratifies the construction of the same by the board of health

in an irregular way and the city becomes as responsible for damages resulting thereby to private individuals as if the ditch had been built in strict accordance with the method and conditions prescribed by the legislative act. We are aware that there are cases holding that all the conditions precedent to an act must be complied with, or else the city will not be liable; but the weight of authority, at least of modern authority, is that where a city has authority to do an act, performance in an irregular way, or by a different instrumentality from that prescribed, will not prevent liability from attaching. The trend of modern authority can be gathered from the following: 20 Am. & Eng. Ency. of Law, 2d ed., 1201, 1202; 2 Dillon on Municipal Corporations, 4th ed., secs. 968, 972; City of Pekin v. Newell, 26 Ill. 320, 79 Am. Dec. 378; City of Chicago v. Turner, 80 Ill. 419; Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 219, 2 N. W. 1064, 6 N. W. 706; Clayton v. Henderson, 103 Ky. 228, 44 S. W. 667; Collensworth v. New Whatcomb, 16 Wash. 224, 47 Pac. 439; Sherman v. Grenada, 51 Miss. 186; Allison v. Richmond, 51 Mo. App. 133; Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242; Poillon v. Brooklyn, 101 N. Y. 132, 4 N. E. 191; Mayor of New York v. Sheffield, 4 Wall. 189; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299; Dooley v. Kansas, 82 Mo. 444, 52 Am. Rep. 380. See, in this connection, Hazlehurst v. Savannah etc. R. R. Co., 43 Ga. 54 et seq.

8-10. The officers in charge of the affairs of a municipal corporation may select places for the construction of a system of sewerage and drainage, and adopt a plan for such construction, without rendering the city liable in damages for injuries resulting from such selection and from the proper construction of the system. These officers may also, if it is necessary, take or damage property of private citizens in constructing the system of sewerage and drainage, but adequate compensation must be paid for property so taken or damaged. The same is true of the construction of any public improvement: City of Atlanta v. Green, 67 Ga. 386; Moore v. Atlanta, 70 Ga. 611; Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316. If a municipal corporation negligently constructs a system of sewerage or drainage, or negligently maintains one properly constructed, so as to injure private citizens or their property, it will be liable in damages for the injury thus occasioned. The power to construct and maintain a system of drainage does not carry with it the right to maintain it in such a way as to endanger the health

of the inhabitants or injure their property. The allegations of the plaintiff's petition bring the case within the previous decisions of this court: See Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458; Massengale v. Atlanta, 113 Ga. 966, 39 S. E. 578, and citations; Mulligan v. Augusta, 115 Ga. 337, 41 S. E. 604. The difficulty arises as to the measure of damages. The rule on this subject is this: If the nuisance is not of a permanent character, but such as the city may at will abate, and when abated the injury occasioned by its maintenance will cease, the plaintiff can recover merely the damages which he has sustained within the period prescribed by the statute of limitations for bringing a suit of this character. But if the nuisance is of a permanent and continuing character, the plaintiff may recover in one action all the damages, past and future, which the maintenance of the nuisance has occasioned and will occasion in the future: Reid v. Atlanta, 73 Ga. 523; Danielly v. Cheeves, 94 Ga. 263, 21 S. E. 524; Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458; Massengale v. Atlanta, 113 Ga. 966, 39 S. E. 578; Mulligan v. Augusta, 115 Ga. 337, 41 S. E. 604. In the case of permanent injury to the freehold, resulting from the proper construction and proper maintenance of any work of public improvement, the measure of damages is the difference in market value before and after the work was [509] constructed and maintained: Moore v. Atlanta, 70 Ga. 611; Smith v. Floyd County, 85 Ga. 420; City Council v. Schrameck, 96 Ga. 426, 51 Am. St. Rep. 146, 23 S. E. 400. If the market value of property is increased by a wrongful act of the city, it would still be liable for the actual damages resulting from injuries therefrom to the property: Farkas v. Towns, 103 Ga. 150, 68 Am. St. Rep. 88, 29 S. E. 700; Mayor etc. v. Tucker, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701. The nuisance complained of in this case—that is, the improper maintenance of the ditch—is not a permanent one, but rather one which can be abated by the city at any time. The nuisance complained of does not consist in the mere presence of the ditch or of the culvert, but in the manner in which they are maintained. The culvert was constructed to divert the water into the ditch. The nuisance may be abated, then, either by restoring the water to its former flow, or by repairing the ditch in such a way that it will carry off the water which comes into it through the culvert. We do not think, therefore, that this is a case for the recovery of prospective damages resulting from the construction and maintenance of the ditch as a nuisance.

The plaintiff is, however, entitled to recover for all legitimate damages of every kind which he has sustained, at least up to the time that he served his notice of claim upon the city authorities. He can recover for the increased expense to which he has been put in the building of bridges, etc., by reason of the construction and maintenance of the ditch. He can recover whatever actual damages he has sustained by reason of sickness, or by reason of injury to his property, growing out of the maintenance of the ditch in such a way as to make the same a nuisance. In a word, the plaintiff can recover all the actual damages he has sustained by reason of the wrong complained of, on the theory that the ditch as maintained is a nuisance; but he can recover nothing on the theory that the city will continue to maintain the nuisance. If, as matter of fact, it does continue to maintain it, he can bring another action for damages after they have accrued, and do this just as long as the city fails and refuses to abate the nuisance. If the rental value of the plaintiff's premises has been less during the maintenance of the nuisance and by reason of it, this would be a proper element of damage; and the damage to the plaintiff's land caused by caving and washing can also be recovered, the measure of damages being the cost of restoring his land to the condition in 600 which it was prior to the injury. The plaintiff has a right, however, to recover damages if his property was damaged by the construction of the ditch, even though it was properly constructed and has been properly maintained. If his freehold estate was injured by the construction of the ditch, the measure of damages would be the difference in market value before and after the construction of the ditch. The trial judge was of opinion that injury to the freehold was not a proper element of damage, under the allegations of the petition and the proof offered in support thereof. In this we think he erred. The petition claimed damages on account of diminished market value resulting from injury to the freehold, and also for the actual damages sustained on account of the maintenance of the ditch in such an improper manner as that it became a nuisance. There was evidence to authorize a recovery on both counts. Several of the charges of the court were not in harmony with this view, and a reversal of the judgment refusing a new trial is therefore rendered necessary.

11-12. The petition alleged that the caving of the ditch has impeded the growth and endangered the life of a number of shade trees which plaintiff "had planted in the inclosure on his

premises near said Turknett Springs road." In the notice served upon the city before the suit was filed, damages were claimed on the ground that the caving of the ditch had practically destroyed the shade trees "set out by the owner in front of his property." The court refused to admit evidence relating to damage to the shade trees, on the ground that there was a substantial variance between the notice and the petition. We think this was error. The act of December 20, 1899, requires that all persons having claims against municipal corporations, for injuries to person or property, to present "in writing such claims to the governing authority of said municipality for adjustment, stating the time, place, and extent of such injury, as near as practicable, and the negligence which caused the same," before bringing suit against the corporation: Acts 1899, p. 74. This act does not contemplate that the notice shall be drawn with all of the technical niceties necessary in framing a declaration. The purpose of the law was simply to give to the municipality notice that the citizen or property owner has a grievance against it. It is necessary only that the city shall be put on notice of the general character of the complaint, and, in a [601] general way, of the time, place, and extent of the injury. The act recognizes, by the use of the words "as near as practicable," that absolute exactness need not be had. A substantial compliance with the act is all that is required; and when the notice describes the time, place, and extent of the injury with reasonable certainty, it will be sufficient: See, in this connection, Laue v. Madison, 86 Wis. 453, 57 N. W. 93; Barrett v. Hammond, 87 Wis. 654, 58 N. W. 1053; City of Denver v. Barron, 6 Colo. App. 72, 39 Pac. 989; McCabe v. Cambridge, 134 Mass. 484; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38. The petition need not exactly follow the notice, and an immaterial variance between the two as to time, place, or extent of injury will not amount to a fatal variance. We do not think the variance in the present instance was so substantial as to prevent the plaintiff from proving damage to his shade trees. Doubtless a proper construction of the notice would be that the plaintiff intended to fix the location of the trees on the front portion of one of his lots. At any rate, the city was sufficiently put on notice as to the location to be able to find them without difficulty upon an inspection of the premises, and ascertain whether any injury had been done to them, and, if so, what was its extent. Moreover, the city had a right to waive the notice altogether, as well as

its right to insist upon a variance: Foster v. Bellaire, 127 Mich. 13, 86 N. W. 383. And it would seem that a failure to demur to the petition on this ground, when the notice was attached thereto as an exhibit, would amount to a waiver. The plaintiff being entitled to prove the extent of the injury to the shade trees, to throw light on the market value of the property after the construction of the ditch, this error resulted in substantial injury to him.

13. The pleadings and the evidence sufficiently raised the question as to whether a portion of the property which the plaintiff claimed had been damaged did not extend over into the public road. If such was the case, the plaintiff could, of course, recover nothing by way of damages to this property. He could acquire no prescriptive right to it, and the court properly charged the jury to this effect: Norrell v. Augusta Ry. Co., 116 Ga. 313, 42 S. E. 466. This would not, however, affect his right to recover for injuries to other property, and the charge of the court should not have been broad enough to exclude him from recovering for such injuries. Nor do we think the plaintiff could acquire any prescriptive right [602] against the city to have artificial obstructions erected for the purpose of carrying off the surface water in front of his property remain in the condition in which they were in when he acquired the property. The city had a right to change such obstructions or substitute other and different obstructions, or take them away altogether, whenever it was necessary for the proper management of its system of drainage and sewerage to do so. No lapse of time would deprive it of this right, though it would, as in other cases, be liable to plaintiff for the amount of damages thereby inflicted upon his freehold estate. The charges on these subjects were substantially correct.

The foregoing disposes of all of the material questions raised by the record. In one ground of the motion for a new trial complaint is made that the court charged the jury that plaintiff could recover nothing on account of the unsightliness of the ditch in front of his property. Proof of this fact might shed some light on the question of diminished market value, and it was competent to introduce evidence as to the character and appearance of the ditch, for this purpose. The court also charged the jury that plaintiff could not recover for any damages resulting from an extraordinary rainfall. This was, under the facts of this case, stated too broadly. The plaintiff claimed that when he bought the property there was a ditch in

front of it sufficient to carry off all the water which would naturally come into it from either ordinary or extraordinary rainfalls. The jury ought to have been allowed to take into consideration the increased volume of water flowing through the culvert; and if the ditch and culvert were improperly maintained, the plaintiff was entitled to recover for whatever damage this increased flow of water caused, in connection with the improper character of the culvert or ditch, whether the rainfall was ordinary or extraordinary. In other words, if the increased flow of water through the culvert contributed to or increased the damages which would result from an improper maintenance of the ditch or culvert or both, the plaintiff would not be precluded from recovering merely because the rainfall was extraordinary. Let the case be tried again in the light of what is herein laid down.

Judgment on main bill of exceptions reversed; on cross-bill affirmed. By five justices.

The Liability of Cities in the matter of their sewers is discussed in the monographic note to Chalkley v. Richmond, 29 Am. St. Rep. 737-744. And the liability of cities generally for the negligence or misconduct of their officers or agents is discussed in the monographic note to Goddard v. Harpswel, 30 Am. St. Rep. 376-413. That a city is answerable for an improper construction of its sewers or for a failure properly to maintain them, see King v. Granger, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. 1012; Chicago v. Seben, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; Judd v. Hartford, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510; Clay v. St. Albans, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368; Brunswick v. Tucker, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701; Williams v. Greenville, 130 N. C. 93, 40 S. E. 977, 89 Am. St. Rep. 860, and cases cited in the cross-reference note thereto; Arndt v. Cullman, 132 Ala. 540, 90 Am. St. Rep. 922, 31 South. 478; Louisville v. Norris, 111 Ky. 903, post, p. 437, 64 S. W. 958.

A City has Inherent Authority to make contracts and construct works beyond its corporate limits for the discharge of sewage when necessary or manifestly desirable: Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; McBean v. Fresno, 112 Cal. 159, 53 Am. St. Rep. 191, 44 Pac. 358.

STONE v. STATE.

[118 Ga. 705, 45 S. E. 630.]

AN ACCESSORY may be Tried Before the Principal, if the law makes the offense of each a separate and distinct crime. (p. 147.)

ACCESSORY.—Perjury and Subornation of perjury are independent crimes in Georgia; the suborner is not the accessory of the perjurer, and may be tried before the latter's conviction. (p. 148.)

ACCOMPLICE.—A Witness is an Accomplice Only When he could have been tried as principal or accessory in the offense under consideration. (p. 149.)

ACCOMPLICE.—A Suborner of Perjury and the Perjurer are not accomplices. (p. 149.)

ACCOMPLICE, Corroboration of.—A Suborner of Perjury may be convicted on the uncorroborated testimony of the perjurer. (p. 150.)

ACCOMPLICE, Corroboration of.—At the Common Law a conviction could be had on the uncorroborated testimony of an accomplice. (p. 152.)

ACCOMPLICE, Corroboration of.—The Practice of the English judges in advising the jury to acquit where there is accomplice testimony only was not within the terms of the Georgia adopting statute; and it has not been incorporated in the code of that state as to misdemeanors, nor as to felonies except when the only witness to a fact is an accomplice. (p. 153.)

WITNESS.—Neither Bad Character nor Conviction of Crime, such as perjury, renders a witness incompetent; but such matters go to his credibility. (p. 154.)

PERJURY, SUBORNATION OF—Evidence.—On a Trial for the subornation of the mother, what the accused said and did at the house in suborning her daughters is relevant as a part of the general scheme to procure evidence and as showing motive and intent. (p. 156.)

EVIDENCE, RELEVANCY OF.—The Laws of Evidence are Adjusted to the Laws of Mind, as well as to laws of the land; and any fact is relevant which, when taken alone or in connection with another, would warrant the jury in drawing a logical inference with reference to the issue on trial. (p. 156.)

EVIDENCE.—When Evidence is Provisionally Admitted on the statement that it will subsequently be connected and made admissible, it is not for the court, of its own motion and without a request from opposing counsel, to exclude the evidence if the connection is not made. (p. 156.)

PERJURY, SUBORNATION OF.—One Witness is sufficient to establish what a suborner of perjury does, but two witnesses, or one witness and corroborating circumstances, are necessary to establish the perjury. (p. 157.)

PERJURY, SUBORNATION OF DEFINED.—Whoever shall procure another to commit perjury is guilty of subornation of perjury. (p. 157.)

Samuel H. Sibley, Arnold & Arnold and George A. Anderson, for the plaintiff in error.

J. E. Pottle, solicitor general, for the defendant in error.

[705] LAMAR, J. Stone was indicted for suborning Linda Green to commit perjury on the trial of Newsome, charged with the murder of Lula James. The fact of such subornation was proved by the positive and direct testimony of Linda Green herself, and also by her two [706] daughters, who, according to the theory of the state, were likewise independently suborned to testify to distinct facts in the trial for murder; and there was evidence that the defendant at night made many visits to the house of the Greens for the purpose of coaching them as to the testimony to be given by them on the trial of Newsome. In his statement the defendant admitted having gone to Linda Green's house at night, and that on the first occasion he talked with her for some time in reference to her testimony before the coroner's jury, and her explanation thereof, though he insisted he had done nothing improper, and had gone only as a friend of Johnson, the half-brother of Newsome. He claimed that on the second occasion he acted solely as an officer to witness affidavits containing the statements of Linda Green and her two daughters. The testimony of a witness, Campbell, in part tended to establish that the testimony of Linda and her two daughters on the trial for murder was false. The jury found the defendant guilty. The exceptions mainly argued here involve the question as to whether Stone was an accessory, and could be tried before the conviction of Linda Green of perjury; whether Linda and her two daughters were accomplices of Stone; and whether he could be convicted on their uncorroborated testimony, especially as they confessed that they had been guilty of perjury in reference to the same facts on the trial for murder. These are the controlling points in the case.

The crime of subornation of perjury is usually committed in secret, by word of mouth, without leaving any of the physical signs affording circumstantial evidence by which other offenses are so often established. Hence the books contain comparatively few cases on the subject; and while we have had from both sides arguments of marked ability, we find little direct authority on the only question orally argued, as to whether the perjurer is the accessory and accomplice of the suborner.

1. The defendant demurred to the indictment, on the ground that a suborner is the accessory before the fact to the crime of perjury, and therefore he could not be put on trial until it was charged [707] that Linda Green, the alleged perjurer, had been convicted, or shown to be dead, or otherwise was within the exceptions laid down in the Penal Code, section 49. The demurrer was properly overruled; for, while an accessory cannot usually be tried until after the conviction of the principal, there is nothing to prevent the indictment of the principal and accessory at the same term, by the same grand jury and even in the same bill. The approved forms of indictment for subornation omit any reference to the prior conviction of the perjurer: Bishop's Directions and Forms, 2d ed., sec. 968. But the accused raises the same questions by assigning as error that the court failed to direct a verdict when at the close of the testimony it appeared that Linda Green had not been found guilty.

2. In perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct. The two crimes both culminate in the delivery of false testimony. Still the offenses are dual, each having in it elements not common to the other. There is sufficient inherent difference between the two to warrant the law-making power in separating the act into its component parts, making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer. The act of the suborner may be accessorial in its nature; and as it is necessary to prove perjury as well as subornation, it may often be best to try the perjurer first. But just as principals in the second degree, formerly called accessories at the fact, may now be tried before the principal in the first degree (Williams v. State, 69 Ga. 11), so the general assembly can provide that one theretofore even a technical accessory is to be treated as principal, and under such a statute he is to be indicted and tried as such. The tendency of modern legislation is all in this direction, so as to do away with the distinction under which the guilt of the accessory was regarded as derivative and dependent. Many statutes now provide that each shall be guilty of a substantive and independent offense: 1 Wharton's Criminal Law, 10th ed., sec. 237. Some expressly provide that what was formerly the accessory may be tried before the principal, and the same result follows, even without such provision, when the offense of each is made separate and

distinct. Thus, where a statute made aiding, abetting, or procuring a crime to be committed a substantive [708] offense, it is not necessary that the principal should be convicted before the accessory can be tried, although nothing was said in the act as to when the accessory could be tried: Noland v. State, 19 Ohio, 131, citing Commonwealth v. Andrews, 3 Mass. 126; Brown v. State, 18 Ohio St. 496 (6); Goins v. State, 46 Ohio St. 457, 21 N. E. 478 (3). When, therefore, the Penal Code, sections 256, 257, defines perjury, and provides a punishment of from four to ten years in the penitentiary, and in separate sections (261 and 262) defines the independent crime of subornation of perjury, with the different punishment of from three to ten years, we have, in effect, a legislative declaration that there are two crimes; that instead of having one principal and one accessory, there are two principals; that the suborner and the perjurer are alike to be treated, tried, and punished as principals; that each may be separately prosecuted for his independent crime; and that the rule requiring the prior conviction of a principal before an accessory can be convicted (Pen. Code, sec. 49) has no application.

Nor is Commonwealth v. Smith, 11 Allen, 243, relied on by the accused, an authority opposed to the conclusion hereinbefore stated. There the letters which procured the false testimony were written by the defendant to the wife of the witness, who handed them to her husband, and thereafter Smith was indicted for subornation. He insisted that he was only accessory to the subornation which the wife had procured. The court held that Smith procured the wife to procure her husband to commit perjury; that the crime of subornation is in its nature that of an accessory before the fact to the perjury; that whoever procures a felony, though it be by the intervention of a third person, is accessory before the fact; that the accessory is a felon, though his felony is different in its kind from that of the principal; that he who procures a felony to be done is a felon. But it thereupon proceeded to say: "We cannot see that the application of these principles is changed when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted." So far as we can learn from the report the suborner was tried before the alleged perjurer. So too, ap-

parently, in Evans v. People, 40 N. Y. 2; Babcock [700] v. United States, 34 Fed. 873. That the suborner is not, under our law, treated as the accessory of the perjurer is further evident from the fact that they are punished differently, while under the code accessories before the fact are punished in the same way as principals: Pen. Code, secs. 46, 257, 261. Besides if the suborner is in law the accessory of the perjurer, it required no statute to define his offense, but the case would have been within the general rule applicable to the case of all accessories.

3-5. If not accessories, the suborner and the perjurer are not accomplices. It is true that participation in many of the acts going to make up the two separate offenses is of such a nature as apparently to bring each close to the rule requiring corroboration; and there are some cases which hold that if the witness was in any sense a particeps criminis, there must be corroboration of his testimony before a conviction could be sustained: Roach v. State, 4 Tex. App. 46. On the other hand, when the rights of the public or of the defendant depend on the meaning of this word, neither can expect the courts to do other than apply the definition accepted and recognized in the law. The term cannot be used in a loose or popular sense, so as to embrace one having guilty knowledge, or morally delinquent, or who was even an admitted participant in a related, but distinct, offense: United States v. Van Leuven, 65 Fed. 78; People v. Sternberg, 111 Cal. 6, 43 Pac. 198. It must appear that the witness is an accomplice, before the law relating to accomplices can be invoked; and according to the rule laid down in many approved cases, and expressly adopted in Keller v. State, 102 Ga. 506, 31 S. E. 92, he is such only when it is shown that he could have been tried as principal or accessory in the offense under investigation. Others may be, but the woman cannot be an accessory to seduction or rape of herself. For her to aid in the rape or to procure some one to seduce her negatives the existence of the essential element of such crimes. So likewise, in the very nature of things, Linda Green could not procure Stone to procure her to commit perjury. And if she could not thus be an accessory to suborning herself, it would logically result that she is not within the definition of an accomplice. The same test has been applied in other and similar cases, where the separate act of two was as necessary to complete the crime as in subornation and perjury. While there is some conflict in the authorities, most of the

courts [710] hold that the woman who consents to an abortion is not an accomplice of the abortionist, and that he may therefore be convicted on her uncorroborated testimony, notwithstanding she is a particeps criminis; and it will not do to say that she is a victim, for the rule is the same where she seeks out the physician and procures him to do the felonious act. So, where one is being tried for the illegal sale of liquor, a conviction has been sustained on the testimony of the purchaser, although the sale could not have been made without the latter's concurrent act in buying. But since the statute does not punish him, he could not be convicted as an accessory, and hence is not an accomplice within the meaning of that word as defined in the test given above. In Queen v. Boyes, 1 Best & S. 3112 (8), on the trial of an information for bribery, the three witnesses who had received the money testified: semble, "that these witnesses, if accomplices of the defendant at all, were not accomplices in such a sense as to require corroboration." In adultery the act, offense, and punishment of both participants is the same; both could be punished as principals, and each is therefore usually treated as the accomplice of the other.

While there must be fornication before the completion of the independent, though concurrent, crime of seduction, yet, as the woman could not be tried as principal or accessory to the crime of seducing herself, this court, contrary to the views taken by others, held, in Keller v. State, 102 Ga. 506, 31 S. E. 92, that the seducer may be convicted on her uncorroborated testimony. So, by parity of reasoning, and in strict analogy, one who suborns, or seduces, another to commit the crime of perjury may be convicted on the testimony of the perjurer. In State v. Renswick, 85 Minn. 19, 88 N. W. 22, the court held that the constituent element of perjury must be proved by two witnesses or one witness and corroborating circumstances, but the fact that he was induced to commit perjury by the person on trial for subornation may be established by the perjurer's uncorroborated testimony. And a similar ruling was made in United States v. Thompson, 31 Fed. 331, where it was said, "the person solicited to commit perjury is not an accomplice in the crime of subornation committed by the person who suborned him; and the fact that he committed the perjury does not prevent the jury from convicting the suborner . . . . on his testimony." By a divided bench the court of appeals of New York, in People v. Evans, 40 N. Y. 5, in [711] effect,

held to the contrary, saying that "the general rule is well settled that a prisoner may be convicted upon the sole uncorroborated testimony of an accomplice, but the crime of subornation of perjury forms an exception to the general rule." That case is opposed to the principle settled for us in Keller v. State, 102 Ga. 506, 31 S. E. 92, and, besides, was decided before the adoption of the New York statute similar to ours on the competency of witnesses, and probably does not state the rule which would now be followed in New York. See the history of the change, and the comments on this decision, in 29 Am. & Eng. Ency. of Law, 1st ed., 781; and People v. O'Neil, 109 N. Y. 251, 16 N. E. 68.

We will not discuss the question as to how far the admission by the defendant in his statement, that he had gone to Linda Green's house at night and there talked with her as to her testimony, may amount to corroboration; nor whether Annie and Eliza Green could be accomplices because only concerned in a related but distinct offense: People v. Sternberg, 111 Cal. 6, 43 Pac. 198. And having determined that Linda Green, the perjurer, was not a technical accomplice of Stone, the alleged suborner, it would be unnecessary to consider the necessity for corroboration, but for the fact that the plaintiff in error raised the point both by requests to charge and also in an attack on the verdict as being contrary to law. He insists that these three witnesses were at least participants in the crime, and if not accomplices within the letter of the definition, they were such in substance; that in considering the probative value of testimony the spirit of the rule should govern, and verbal niceties should be ignored; that according to the practice in criminal cases the jury were instructed not to convict even on the uncorroborated testimony of two or more accomplices; and that in the present case the application of these well-recognized principles of law demanded Stone's acquittal.

This argument necessarily proceeds upon the idea that accomplices in all respects form an exception to the rule laid down as to the right of the jury to pass upon the credibility of impeached witnesses (Civ. Code, sec. 5295); that their testimony is inherently bad; that to add testimony of one accomplice to that of another is to add nothing to nothing, the result still being nothing. On the contrary, on general principles, and until a comparatively recent date, the testimony of even a single accomplice was sufficient [712] to support a conviction. At common law where one had been found guilty of

a felony, and judgment had been entered thereon, he was considered infamous and incompetent to testify. But when the witness showed that he was in fact guilty of a felony as an accomplice of the defendant on trial, it appeared that nothing was needed except a formal judgment to render him actually incompetent. This, among other reasons, finally led the judges, in the exercise of their broad power to advise concerning evidence, to caution the jury that while they could consider such testimony, it ought to be corroborated before a verdict could be sustained thereby. In his work on Testimony of Accomplices, pages 1-6, Baron Joy says: "At what time the regulation came to be adopted is not easy to ascertain. . . . . In the conduct of Lord Holt it is nowhere discoverable. I do not find that Lord Hardwicke, when he presided in the king's bench, had an idea of its existence; and even Lord Mansfield does not seem (at least in the year 1775) to have had a conception, either of its existence or its necessity." As late as 1788 Buller, J., being in doubt "whether the evidence of an accomplice unconfirmed by any other evidence that could materially affect the case was sufficient to warrant a conviction," referred the case to the consideration of the full bench, and in passing sentence announced that the judges were unanimously of opinion that an accomplice alone is a competent witness, and if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal: King v. Atwood, 1 Leach, 464; Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391. And when the regulation was finally and firmly established, its application was in the discretion of the trial judge. As late as 1861 Chief Justice Cockburn, in Regina v. Boyes, 9 Cox C. C. 35, on a trial for bribery, where those who took the money were witnesses, said: "I protest against its being the duty of the judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated." Even in states where the rule obtains, the accused is not entitled, as matter of right, to have it given in charge. Thus in Commonwealth v. Wilson, 152 Mass. 12, 25 N. E. 16, it was said that it is a general rule of practice, but not a rule of law, to advise the jury not to convict upon the uncorroborated testimony of an accomplice; and the judge presiding at the trial may, in his discretion, decline to adopt the rule, and may refuse so to advise the jury, or to define [713] corroborative evidence within the meaning of the rule. But even if it be treated as a rule

of law, it was not of force in England on May 14, 1776, and therefore not within the terms of our adopting statute: Act of Sept. 16, 1777, Watkins' Digest, 202; Act of Feb. 25, 1784, Cobb's Digest, 721. That a judgment on a conviction for a felony rendered a witness infamous was probably true in this state until the act of 1866 (Acts 1866, p. 138), Civil Code, section 5269. Compare Cobb's Digest, 840, par. 340. And even if the same reasons which caused the adoption of the rule in England were consequently operative in this state, they ceased to be longer applicable when, by the act of 1866, a conviction for crime no longer rendered a witness incompetent: Fain v. State, 40 Ga. 534 (5). Certainly, as a rule of practice, it ceased to have any validity when by Civil Code, section 4334, the judges were prohibited from longer advising the jury as to what had or had not been proved, or expressing any opinion as to the evidence or of the weight to be given thereto: State v. Green, 48 S. C. 136, 26 S. E. 234, 238. The only part saved is that contained in the Penal Code, section 991, which requires corroboration in any case of felony where the only witness is an accomplice. So that, while elsewhere the regulation is broader, it is only one of practice. In Georgia it is more restricted, but a rule of law to the extent laid down in the Penal Code, section 991, Civil Code, section 5156, which, however, is not an attempt to codify the principle as enforced in England. There it was applicable to cases of misdemeanor as well as of felony: Taylor on Evidence, 9th ed., sec. 968. Here the complicity of the witness in misdemeanor cases merely goes to his credit, and the rule applies only to cases of felony: Parsons v. State, 43 Ga. 197. Nor does the section appear to deal with the effect of the testimony of more than one accomplice. In other states one accomplice cannot generally corroborate another; but our code is silent on that point. The point was assumed, but not expressly dealt with, in Johnson v. State, 92 Ga. 578, 20 S. E. 8. An analysis of the section will show that it is dealing with the "number of witnesses necessary." It begins by laying down the proposition that "the testimony of a single witness is generally sufficient to establish a fact." It then proceeds to provide that "exceptions to this rule are made in specified cases, such as to convict of treason or perjury, and in any case of felony where the only witness is an accomplice; in these cases [714] (except in treason) corroborating circumstances may dispense with another witness." The statute being silent, the courts have no right to

extend the exceptions beyond its terms: Childers v. State, 52 Ga. 117. Nor does the provision in the Political Code, section 4, paragraph 4, that the singular includes the plural, apply when it is apparent that the statute is dealing with the number of witnesses necessary, and expressly declaring that one is sufficient except in specified cases.

6. The accused renews the attack on the verdict in view of the admission by Linda Green and her two daughters that they had committed perjury. As this was on the trial of a different case, though in reference to the same general transaction, there was no request to charge as to the necessity for corroboration under Civil Code, section 5295: Stafford v. State, 55 Ga. 592; United States v. Thompson, 31 Fed. 333. As even conviction of the crime would not have rendered the witnesses incompetent, it was but another fact to be considered by the jury in determining what credit should be given their evidence: Civ. Code, sec. 5294. In People v. O'Neil, 109 N. Y. 251, 16 N. E. 68, it was shown that two of the witnesses for the state had, in their testimony before a senate committee, committed perjury in reference to the same matter which was involved in the prosecution for bribery. It was objected that a conviction could not be sustained on their testimony, and Judge Andrews, after reciting the New York statute, which is similar to that contained in the Civil Code, section 5269, declaring that no witness should be incompetent because of his conviction for a crime, said that "the testimony of a witness who has committed perjury in the same matter on a prior occasion must be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court: See, also, Owen v. Palmour, 111 Ga. 885 (2), 36 S. E. 969; Phoenix Ins. Co. v. Gray, 113 Ga. 432 (3), 38 S. E. 992. That a witness is an accomplice, or a participant in a related offense, or a perjurer on the trial of a different case as to the same subject matter, or is of bad character, goes to his credibility. Such facts are, of course, matter for argument and careful consideration by the jury. No doubt they scan with anxious deliberation evidence coming from such sources. But one previously perjured may tell the truth in the case then on trial; and if, after rigid cross-examination, hearing all the testimony and listening [715] to the statement of the defendant himself, the jury are satisfied that the testimony of such witness is true—if it is consistent, prob-

able, and bears the stamp of truth—they may accept it and act on it, and this court cannot disregard their finding, nor say that the evidence was insufficient to warrant the verdict. The duty of passing on the credibility of this class of witnesses, without advice from the presiding judge, is but one of the added responsibilities resulting from the enlarged powers conferred upon jurors. In a criminal trial they owe a duty to society to see that the guilty are punished; and they are under the same duty to see that the innocent are not convicted. To discharge these high and solemn obligations they must apply the tests of sound sense and their experience as practical men to determine whether the evidence is so untrustworthy as to entitle the defendant to an acquittal, or whether it proves to their satisfaction beyond a reasonable doubt that the prisoner has violated the laws of his state and should suffer a deserved punishment.

7. The foregoing rulings apply to the bill of exceptions pendente lite, and to the ninth, fourteenth, fifteenth, nineteenth, twenty-second, twenty-third, and twenty-fourth grounds of the motion. The assignments in the first, second, third, fourth, fifth, seventh, eighth, tenth, eleventh, twelfth, thirteenth and sixteenth grounds may be grouped and considered together. According to the theory of the state, the coaching of the witnesses extended over a period of several weeks. In this Stone and Johnson are said to have participated with the connivance of Riley Green, the husband of Linda Green. Most, if not all, of the transactions took place in the latter's house, and some, if not all, were in the presence of the mother and the two daughters—Stone and Johnson both being present. The defendant objected to evidence of statements by Stone, or by Johnson in his presence, to the two daughters as to what their testimony should be, on the ground that, as this particular indictment did not allege any subornation of perjury as to Eliza and Annie Green, such statements were inadmissible and irrelevant. It is not necessary to set out the objections in extenso, because the sayings and acts were certainly admissible as part of the general scheme by Stone to procure evidence which would secure the acquittal of Newsome; and while this involved the commission of separate acts of perjury by the mother and the two daughters, and separate crimes of subornation by Stone, it was all relevant in that [716] it shed light as to the motive, intent, and character of his conduct. Some

of these conversations were in his presence, and all of the transactions were within the scope of his criminal purpose, and by one or another of those he had selected as tools to accomplish his design. While independent of each other, all of the witnesses were concerned with Stone, and the evidence, if not a part of the res gestae, was clearly relevant within the meaning of the Civil Code, section 5158. The laws of evidence are adjusted to the laws of mind as well as to the laws of the land, and any fact is relevant which, when taken alone or in connection with another, would warrant the jury in drawing a logical inference with reference to the issue on trial.

8. The first ground of the amended motion for a new trial is that the court admitted the testimony of Linda Green as to messages alleged to have been sent to her by Stone through her husband, Riley Green, on the statement by the solicitor general that he expected to make proof by Riley that the messages had in fact been sent by Stone. In the sixth ground it is assigned as error that Riley Green having clearly failed to connect the testimony of his wife with that alleged conversation with the defendant, and having failed to state that he told his wife what the defendant had said, the court failed to rule out the testimony. No new motion was made to that effect. Where incompetent evidence is admitted on the statement that it will be subsequently connected and made admissible, it is the right of the objecting counsel to renew his motion at a later stage of the trial; and if the connection has not been made, it will then be the duty of the court to exclude the testimony with proper instructions to the jury not to be influenced thereby. But it cannot be expected that in a long and tedious trial the court should bear these matters in mind, and of his own motion exclude what has been thus provisionally admitted. It is for counsel interested to remind him of the circumstances and have it ruled out, if he so desires. It may often happen that counsel may prefer to let the evidence remain in the record. Subsequent testimony may make the former evidence helpful to the party who originally objected. At any rate, if counsel remain silent, the court is authorized to conclude that the party regards the evidence admitted as immaterial, not hurtful, or possibly helpful.

It was not error to charge the law relating to perjury, and the [717] rules of evidence relating thereto. In a trial for perjury it is oath against oath, and in the nature of the case there

must be two witnesses, or one witness and corroborating circumstances, to convict: Pen. Code, sec. 991. But subornation of perjury stands on an entirely different footing. The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did: State v. Renswick, 85 Minn. 19, 88 N. W. 22. It is, however, necessary to show that the person suborned did actually commit the crime of perjury, and as to that portion of the case the court properly charged that the general rule as to perjury would apply, and two witnesses, or one witness and corroborating circumstances, would be necessary to establish the fact of perjury: Commonwealth v. Douglass, 5 Met. 241; 2 Roscoe's Criminal Evidence, 1079, *864. In this case Linda Green admitted that she had committed perjury on the trial of Newsome. That was probably sufficient; but it was corroborated by the testimony of her two daughters, and that of W. W. Campbell, who was driving on the road, and witnessed the killing of Lula James by Newsome.

The definition of subornation of perjury is absolutely concise. Whoever shall procure another to commit the crime of perjury is guilty of subornation of perjury. It says nothing as to how the procurement shall be made successful; and the indictment, being in the language of the code, was sufficient without showing how and why the threat to prosecute procured and induced the perjury: Pen. Code, sec. 260; State v. Geer, 48 Kan. 751, 30 Pac. 236 (1).

We find nothing requiring the granting of a new trial in any of the other grounds of the motion. There was no error in the court's statement of the contentions on the part of the prosecution. The necessity for knowledge by Stone of the falsity of Green's testimony was included in the general charge: People v. Clement, 127 Mich. 130, 86 N. W. 535; Commonwealth v. Devine, 155 Mass. 224, 29 N. E. 515. The instructions as to the effect of impeachment were substantially within the provisions of the code. The charge as to reasonable doubt and the certainty of proof required were correct.

Justice Turner did not preside on the argument, but, having taken part in the consideration of the case, and the several conferences thereon, authorizes the statement that he concurs in the foregoing opinion.

Judgment affirmed.

All the justices concur.

CONVICTING ON THE TESTIMONY OF AN ACCOMPLICE.

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I. Who is an Accomplice.

a. In General.—One would expect to experience little difficulty in finding in the decisions an accurate and universally accepted definition of the word "accomplice." And yet, old as the term is and frequent as its use, its meaning, at least in the law of evidence (and it is in this sense alone that we shall here consider the term), is far from being settled. Some authorities consider that an accessory after the fact is accomplice within the rules of accomplice testimony (Edmonson v. State, 51 Ark. 115, 10 S. W. 21; Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330), while other authorities do not: Springer v. State, 102 Ga. 447, 30 S. E. 971; State v. Jones, 115 Iowa, 113, 88 N. W. 196; State v. Kuhlman, 152 Mo. 100, 75 Am. St. Rep. 438, 53 S. W. 416; People v. Chadwick, 7 Utah, 134, 25 Pac. 737. In Texas the word, as used in the sense that accomplice testimony must be corroborated, is not regarded in its technical sense, but is given a broader interpretation: Williams v. State, 42 Tex.

392. An "accomplice is any person who has participated in the commission of the crime, whether as principal offender or accessory, or in any other manner which makes him a particeps criminis": Ortis v. State, 18 Tex. App. 282. An accomplice has also been defined to be a person who either as principal, accomplice, or accessory, is connected with a crime by unlawful act or omission on his part, transpiring either before, at the time, or after the commission of the offense, and whether or not he was present and participated in the crime": Schwartz v. State, 38 Tex. Cr. App. 26, 40 S. W. 976.

Mere knowledge, however, that a crime is being, or is about to be committed, cannot be said to constitute one an accomplice. Nor can the concealment of such knowledge: Melton v. State, 43 Ark. 367; Rucker v. State, 7 Tex. App. 549; Smith v. State, 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219; Alford v. State, 31 Tex. Cr. Rep. 299, 20 S. W. 553; Garza v. State, 39 Tex. Cr. App. 358, 49 S. W. 103. The wife of a conspirator who knows of the plans to commit a crime is not an accomplice in its subsequent commission: State v. Roberts, 15 Or. 187, 13 Pac. 896. And the same is true where she afterward hears a confession by one of the participants: Elizando v. State, 31 Tex. Cr. Rep. 237, 20 S. W. 560.

In Cross v. People, 47 Ill. 152, 95 Am. Dec. 474, an accomplice is defined "to be one who is in some way concerned in the commission of a crime, though not as principal; and this includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." In State v. Kellar, 8 N. Dak. 563, 73 Am. St. Rep. 776, 80 N. W. 476, Wharton's definition is criticised and Black's adopted: "An associate in crime; one who co-operates, aids, or assists in committing it." The offenders must be accomplices in the particular offense charged; it is not enough that they are in other similar crimes: People v. Van Sternberg, 111 Cal. 3, 43 Pac. 198; United States v. Van Leuven, 65 Fed. 78.

Some of the above authorities define the term "accomplice" in its popular, rather than in its technical, sense. But "when the rights of the public or of the defendant depend on the meaning of this word, neither can expect the courts to do other than apply the definition accepted and recognized in the law. The term cannot be used in a loose or popular sense, so as to embrace one having guilty knowledge, or morally delinquent, or who is even an admitted participant in a related, but distinct offense. It must appear that the witness is an accomplice, before the law relating to accomplice testimony can be invoked; and according to the rule laid down in many approved cases, and expressly adopted in Keller v. State, 102 Ga. 506, 31 S. E. 92, he is such only when it is shown that he could have been tried as principal or accessory in the offense under in-

vestigation": Stone v. State (the principal case), ante, p. 145. The test by which to determine whether or not a person is an accomplice is, could he be indicted for the same offense for which the defendant is being tried": State v. Jones, 115 Iowa, 113, 88 N. W. 196, citing Bass v. State, 37 Ala. 469; Commonwealth v. Wood, 77 Mass. (11 Gray) 93; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319. The tests enunciated by the Georgia and Iowa cases commend themselves as reasonable, especially when applied in those jurisdictions where the statutes arbitrarily declare that there shall be no conviction upon the uncorroborated testimony of an accomplice. See, further, "Convictions of Particular Crimes," post.

b. Person Acting Involuntarily.—A child of twelve or thirteen years of age who assists in a crime under threats and coercion is not an accomplice, and his uncorroborated testimony will sustain a conviction: People v. Miller, 6 Cal. 468, 6 Pac. 99; Beal v. State, 72 Ga. 200. But ordinarily "a person who aids and assists in the commission of a crime or in measures taken to conceal it and protect the criminal, is not relieved from criminality as an accomplice on account of fear excited by threats or menaces, unless the danger be to life or member, nor unless that danger be present and immediate as above announced touching fear under the influence of which perjury is committed": Burns v. State, 89 Ga. 527, 15 S. E. 748. In Green v. State, 51 Ark. 189, 10 S. W. 266, it is held that the failure of a person to report his knowledge of a crime does not constitute him an accomplice, when his omission to act was induced by threats of the accused to kill him if he made known the facts.

c. Feigned Accomplices—Informers and Detectives.—A feigned accomplice is not within the rule that the uncorroborated testimony of an accomplice will not support a conviction: People v. Farrell, 30 Cal. 316; People v. Boulanger, 71 Cal. 17, 11 Pac. 799; State v. Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059. See, too, State v. Brownlee, 84 Iowa, 473, 51 N. W. 25. Thus, a detective who, for the purpose of discovering crime, ostensibly aids in its commission or in a conspiracy to commit it, is not an accomplice whose testimony must be corroborated: State v. McKean, 36 Iowa, 343, 14 Am. Rep. 530; People v. Molins, 10 N. Y. Supp. 130, 7 N. Y. Cr. Rep. 51; Wright v. State, 7 Tex. App. 574, 32 Am. Rep. 599. Compare Dever v. State, 37 Tex. Cr. Rep. 396, 30 S. W. 1071; see State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666; Campbell v. Commonwealth, 84 Pa. St. 187. Of course, evidence coming from such contaminated sources should be closely scrutinized by the jury, but, if they are satisfied of its truth, they may base a conviction upon it. One who buys a lottery ticket in order to detect and punish the crime of selling such tickets, is not an accomplice whose unsupported testimony is insufficient to sustain a conviction: People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128; nor is the purchaser of liquor, where he buys at its unlawful

sale, for the purpose of detecting the seller. See "Sale of Liquor," post. Neither is one who, not knowing of a larceny until after it has been committed, purchases the stolen goods under the directions of an officer, with money furnished by the latter, with a view to detect the thief: People v. Barric, 49 Cal. 392.

d. **Evidence—Questions for Court and Jury.**—If the facts are not in dispute, whether or not a witness is an accomplice is a question for the court; but if the evidence is conflicting, the issue should be submitted to the jury with proper instructions: People v. Kraker, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; State v. Schlagel, 19 Iowa, 169; State v. Carr, 28 Or. 389, 42 Pac. 215; Williams v. State, 33 Tex. Cr. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958. The jury must be reasonably convinced that a witness is an accomplice before the rules of accomplice testimony become applicable: Ross v. State, 74 Ala. 532; Childress v. State, 86 Ala. 77, 5 South. 775. If his testimony raises a strong presumption that he is an accomplice, this has been held sufficient: Pool v. State, 25 Tex. App. 661, 8 S. W. 817. It seems the jury may consider a witness an accomplice without proof beyond a reasonable doubt: Commonwealth v. Ford, 111 Mass. 394.

II. Necessity of Corroborating Accomplice Testimony.

a. **In General.**—At the common law an accomplice is a competent witness. It follows, therefore, that his testimony, although entirely without corroboration, will support a verdict of conviction: Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Lindsay v. People, 63 N. Y. 143; State v. Betsall, 11 W. Va. 703; monographic note to Commonwealth v. Price, 71 Am. Dec. 671. These decisions are especially well considered, and contain a review of the English cases and practice. Other authorities squarely supporting the above doctrine are State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; State v. Williamson, 42 Conn. 261; Jenkins v. State, 31 Fla. 196, 12 South. 677; Brown v. State, 42 Fla. 184, 27 South. 869; Myers v. State, 43 Fla. 500, 31 South. 275; Rider v. People, 110 Ill. 11; Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425; Johnson v. State, 65 Ind. 269; Ayers v. State, 88 Ind. 275; State v. Patterson, 52 Kan. 335, 34 Pac. 784; State v. Thompson, 47 La. Ann. 1597, 18 South. 621; Commonwealth v. Price, 76 Mass. (10 Gray) 472, 71 Am. Dec. 668; People v. Gallagher, 75 Mich. 512, 42 N. W. 1063; People v. Nunn, 120 Mich. 530, 79 N. W. 800; Fitzcox v. State, 52 Miss. 923; White v. State, 52 Miss. 216; State v. Harkins, 100 Mo. 666, 13 S. W. 830; State v. Sprague, 149 Mo. 409, 50 S. W. 901; Olive v. State, 11 Neb. 1, 7 N. W. 444; Lawhead v. State, 46 Neb. 607, 65 N. W. 779; State v. Stroud, 95 N. C. 626; Allen v. State, 10 Ohio St. 287; Watson v.

Commonwealth, 95 Pa. St. 418; State v. Wingo, 11 S. C. 275; People v. Lee, 2 Utah, 441; Dove v. Commonwealth, 82 Va. 301; Woods v. Commonwealth, 86 Va. 929, 11 S. E. 798; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Steinham v. United States, 2 Paine, 168, Fed. Cas. No. 13,355; United States v. Babcock, 3 Dill. 581, Fed. Cas. No. 14,487; United States v. Goldberg, 7 Biss. 175, Fed. Cas. No. 15,223; United States v. Smith, 2 Bond, 323, Fed. Cas. No. 16,322; United States v. Kessler, Baldw. 15, Fed. Cas. No. 15,528; United States v. McKee, 3 Dill. 511, Fed. Cas. No. 15,686; United States v. Flemming, 18 Fed. 907; United States v. Ybanez, 53 Fed. 536. Compare Ray v. State, 1 G. Greene (Iowa), 316, 48 Am. Dec. 379; United States v. Blaisdell, 3 Ben. 132, Fed. Cas. No. 14,608.

That the testimony of accomplices is not of the most satisfactory character, and is attended with serious infirmities, are matters recognized by all the decisions, and are too obvious and well understood to call for exposition. Such considerations, however, go only to the credibility of the evidence, and not to its competency. The law requires that the jury should closely scrutinize such testimony, and accept it with caution; but does declare that they may not believe it, and, believing it, not find a verdict of guilty on it alone. "The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably most, cases the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant, as it is possible it could be satisfied from human testimony—and in such cases it would be an outrage upon the administration of justice to acquit": Collins v. People, 98 Ill. 584, 38 Am. Rep. 105, per Justice Scolfield.

The common-law rule has been changed in many jurisdictions by statutes expressly declaring that the uncorroborated testimony of an accomplice cannot sustain a conviction: See Bird v. State, 36 Ala. 279; Hudspeth v. State, 50 Ark. 534, 9 S. W. 1; People v. Hoagland, 138 Cal. 338, 71 Pac. 359; Smith v. State (Tex. Cr. App.), 8 S. W. 201; Custer v. State (Tex. Cr. App.), 76 S. W. 476.

b. **Advising and Instructing the Jury.**—These statutes crystalize in a rule of positive law what was already a rule of practice which, to greater or less extent, courts regarded themselves bound to ob-

serve, for it has long been the custom, both in England and America, for the court, not only to caution the jury as to the danger of acting upon the unsupported testimony of an accomplice, but to advise them not to convict unless there is some corroborating evidence. This practice, however, cannot be considered as establishing an absolute rule of law. For a judge to so advise the jury is rather in the exercise of a proper judicial discretion than because the law demands it: State v. Wolcott, 21 Conn. 272; State v. Cunningham, 31 Me. 355; Commonwealth v. Bosworth, 39 Mass. (22 Pick.) 397; Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; People v. Jenness, 5 Mich. 305; State v. Watson, 31 Mo. 361; State v. Sprague, 149 Mo. 409, 50 S. W. 901; State v. Hyer, 39 N. J. L. 598; State v. Holland, 83 N. C. 624, 35 Am. Rep. 587; State v. Green, 48 S. C. 136, 26 S. E. 234. See, too, the principal case, ante, p. 145. But the law has been thought not free from doubt and embarrassment on this point: See People v. Clough, 73 Cal. 348, 15 Pac. 5; Commonwealth v. Savory, 64 Mass. (10 Cush.) 535. It is believed, however, that the above statements are an accurate reflection of the law in the absence of any statutory changes. The court is not bound to instruct the jury to acquit when there is no corroboration. The duty of the judge is discharged when he cautions the jury as to the danger of convicting upon such evidence: Cox v. Commonwealth, 125 Pa. St. 94, 17 Atl. 227.

"It is always a question for the jury, who are to pass upon the credibility of the accomplice, as they must upon that of every other witness. His statements should be received with great caution, and the court, as the court did in this case, should always so advise; yet if the testimony of the accomplice obtains full credit with the jury, and they are fully convinced of its truth, they should give the same effect to his testimony as should be allowed to an unimpeached witness who is no way implicated in the offense. Such testimony, if believed by the jury, will warrant a conviction. In all cases where the prosecution depends upon the uncorroborated testimony, the court, as before stated, should advise great caution on the part of the jury in giving credit to it; but the jury are not to be advised or instructed as a matter of law that the prisoner in such case must be acquitted. It is not the duty of the court to advise the jury as to their conclusions upon the evidence which has been given on trial for them to consider and weigh in finding whether the respondent is guilty or not guilty of the offense charged. The accomplice is a competent witness, and his testimony must receive such credit and weight as the jury find it entitled to. If the jury find his testimony to be true, the consequence is inevitable; it needs no confirmation from another witness. When his testimony is believed by the jury, it is unquestionably sufficient to establish the facts as to which he testifies, without any confirmation. It is not for the

court to determine the credibility of the accomplice; and the court cannot, as a matter of law, advise the jury that they must acquit the respondent by reason of lack of credibility of the accomplice when his testimony is not corroborated by other evidence": State v. Dana, 59 Vt. 614, 10 Atl. 727, per Justice Walker.

The refusal of the court, moreover, to give a cautionary instruction is not ground for a reversal. "The suspicion with which the testimony of accomplices," as is stated by Justice Cooper in Cheatham v. State, 67 Miss. 335, 19 Am. St. Rep. 310, 7 South. 204," is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons, has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or to advise. In State v. Haney, 19 N. C. (2 Dev. & B.) 390, the supreme court of North Carolina declared what we understand to be the true rule upon the subject. The practice of giving such instructions or advice to the jury, it is there said, rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error. 'No one,' said the court, 'can require of the judge to give an instruction to the jury, except on the law of the case.' 'The judge may caution them against reposing hasty confidence in the testimony of an accomplice. It is usual, justifiable, and, we add, it is proper to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness without weighing the circumstances of suspicion and distrust under which his testimony is rendered. Long usage, sanctioned by deliberate, judicial approbation, has given to this ordinary caution a precision which makes it approach a rule of law. Jurors are advised that it is deemed hard, and that it is unsafe to convict on the testimony of an accomplice, unless that testimony receive material support from evidence aliunde, so coinciding with it in considerable circumstances as to leave no rational doubt in their minds of its truth. In what parts of the details of the testimony this confirmation should be had, in order to remove the jealousy and suspicion to which the testimony is exposed, and to create such a degree of confidence in his general credibility as to command faith in those parts of his narrative where he is not supported, the judge has not the right to advise or direct the jury. Speculative writers have indeed undertaken, with much ingenuity, to devise rules of faith on the subject, but the law is wholly silent concerning them. Tolerating and approving the general custom, it trusts the application of the caution, under all the circumstances testified, wholly to the intelligence and integrity of the jury.' "

"The effect of our decisions upon this subject," says Justice Field, "seems to be as follows: An accomplice is a competent witness for the prosecution in a criminal case, and a jury may find a defendant guilty upon the uncorroborated testimony of an accomplice. It is, however, a general rule of practice, to advise a jury not to convict upon the uncorroborated testimony of an accomplice, but it is not a rule of law, and it is not error for the presiding justice to refuse so to advise the jury": Commonwealth v. Wilson, 152 Mass. 12, 25 N. E. 16. To the same effect, see Commonwealth v. Clune, 162 Mass. 206, 38 N. E. 435. Compare State v. Perry, 41 W. Va. 641, 24 S. E. 634.

III. Competency and Sufficiency of Corroborative Evidence.

a. **In General.**—Corroborative means to strengthen; to make more certain; to give additional strength: Still v. State (Tex. Cr. App.), 50 S. W. 355. No universal rule, however, can be laid down as to the quantum of corroborative evidence necessary to warrant a conviction, but each case must be governed largely by its peculiar circumstances: See Bell v. State, 73 Ga. 572; State v. Wart, 51 Iowa, 587, 2 N. W. 45; House v. State, 15 Tex. App. 522; Smith v. State (Tex. Cr. App.), 38 S. W. 201; O'Quinn v. State (Tex. Cr. App.), 53 S. W. 110. Frequently slight circumstances and facts of no great prominence will be sufficient to satisfy the mind: State v. Wolcott, 21 Conn. 272; Roberts v. State, 55 Ga. 220. Yet the corroborative evidence must be such as to raise more than a grave suspicion of the guilt of the accused: People v. Thompson, 50 Cal. 480; People v. Koening, 99 Cal. 574, 34 Pac. 238; Taylor v. State, 119 Ga. 150, 35 S. E. 161. It must tend to show his guilt, not a mere suspicion thereof, whether slight or grave, for the mere charge of an offense is likely to excite in the mind a suspicion of guilt: McCalla v. State, 66 Ga. 346. Of course, the corroboration need not be sufficient of itself to authorize a conviction. The whole case need not be made out independently of the accomplice's testimony, nor need every hypothesis but that of guilt be excluded. Were it otherwise, the testimony of the accomplice would count for naught. On the other hand, the corroborative evidence must tend in some degree to show that the defendant is guilty of the commission of the crime charged: Lumpkin v. State, 68 Ala. 56; Chapman v. State, 112 Ga. 56, 37 S. E. 102; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Brin, 30 Minn. 522, 16 N. W. 406; State v. Clements, 82 Minn. 434, 85 N. W. 229; People v. Hooghkerk, 96 N. Y. 149; People v. Ogle, 104 N. Y. 511, 11 N. E. 53.

The corroboration need not directly confirm any particular fact or circumstance stated by the accomplice: Commonwealth v. Chase, 147 Mass. 597, 18 N. E. 565. "Corroborate means to strengthen; to make stronger, not the proof of any particular fact to which the

witness has testified, but to strengthen the probative, criminating force of his testimony": Malachi v. State, 89 Ala. 134, 8 South. 104. But see State v. Kellerman, 14 Kan. 135. "In this commonwealth," says the supreme court of Massachusetts, in Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391, "indeed, as in England, evidence which tends to prove the guilt of the defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice; as, for instance, evidence of the possession of stolen goods by one indicted for stealing or receiving them: Commonwealth v. Savory, 64 Mass. (10 Cush.) 535; Rex v. Wilkes, 7 Car. & P. 272; Regina v. Birkett, 3 Cox C. C. 531. So, where the defendant attempted to prove an alibi, and there was evidence tending to show his presence at the time and place of the commission of the crime, and it appeared that his brother, who, the accomplice had testified, was present when the defendant confessed facts showing his participation in the crime, was not called by the defendant as a witness: Commonwealth v. Brooks, 75 Mass. (9 Gray) 299."

But the corroboration must be upon facts material to the issue: State v. Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; State v. Callahan, 47 La. Ann. 444, 17 South. 50; Commonwealth v. Boswell, 39 Mass. (22 Pick.) 397; Frazer v. People, 54 Barb. 306; Conway v. State, 33 Tex. Cr. App. 327, 26 S. W. 401; State v. Howard, 32 Vt. 380, 78 Am. Dec. 609. And "the phrase 'material to the issue' is used as equivalent to involving the guilt of the party on trial or having necessary connection with the guilt of the defendant": Commonwealth v. Chase, 147 Mass. 597, 18 N. E. 565; Gillian v. State, 3 Tex. App. 132; McNeally v. State, 5 Wyo. 59, 36 Pac. 824. Speaking of the Alabama statute which requires the testimony of an accomplice to be corroborated, Justice Somerville, in Marler v. State, 68 Ala. 580, 586, remarks: "Its purpose, we think, was to require all corroborative evidence either to relate to the actual commission of the offense, or the circumstances thereof, or else to such portions of the narrative of the accomplice as the evidence may tend to show that the defendant had some complicity or connection with. It is clear that the corroboration of collateral facts in the statement of an accomplice is no corroboration at all, so far as concerns the defendant, unless he is shown by other evidence than that of the accomplice to be connected in some manner with such facts." It was held in this case that an accomplice having testified that in pursuance of an agreement with the defendant he killed a man, and immediately thereafter went to the house of the victim's sister, corroborative evidence of the fact of his going to such house after the homicide is inadmissible.

The corroborative evidence, however, need not extend to every material particular, circumstance, or detail of the testimony of the

accomplice. If the jury are satisfied that the accomplice speaks the truth in some material part of his testimony as to which there is corroboration, they may believe that he speaks the truth as to other parts of which there is no confirmation: Montgomery v. State, 40 Ala. 684; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; People v. Kunz, 73 Cal. 313, 14 Pac. 836; People v. Barker, 114 Cal. 617, 46 Pac. 601; State v. Kaplan, 72 Conn. 635, 45 Atl. 1018; Dixon v. State, 116 Ga. 186, 42 S. E. 357; State v. Hennessy, 55 Iowa, 299, 7 N. W. 641; State v. Allen, 57 Iowa, 431, 10 N. W. 805; State v. Hall, 97 Iowa, 400, 66 N. W. 725; State v. Jones, 115 Iowa, 113, 88 N. W. 196; Craft v. State, 3 Kan. 450; Territory v. Corbett, 3 Mont. 50; Kilrow v. Commonwealth, 89 Pa. St. 480; Ettinger v. Commonwealth, 98 Pa. St. 338; Wilkerson v. State (Tex. Cr. App.), 57 S. W. 956; United States v. Troax, 3 McLean, 224, Fed. Cas. No. 16,540; United States v. Lancaster, 44 Fed. 896; United States v. Howell, 56 Fed. 21. Corroboration going to the main fact may be sufficient, although contradicted as to some details: Locklin v. State (Tex. Cr. App.), 75 S. W. 305.

b. **Evidence Connecting Defendant with the Crime.**—It appears, according to some authorities, that evidence corroborative of the testimony of an accomplice need not necessarily connect the defendant with the commission of the offense charged: State v. Maney, 54 Conn. 178, 6 Atl. 401; State v. Gallivan, 75 Conn. 326, 96 Am. St. Rep. 203, 53 Atl. 731; Commonwealth v. Scott, 123 Mass. 222, 25 Am. Rep. 81; Carroll v. Commonwealth, 84 Pa. St. 107; monographic note to Commonwealth v. Price, 71 Am. Dec. 675, 676. Perhaps it will be found that in jurisdictions where this rule prevails, no change has been made in the common-law doctrine that no corroboration at all of the testimony of an accomplice is necessary in order to warrant a conviction However this may be, the weight of judicial opinion seems to be that corroborating evidence, to be competent and sufficient, must tend to connect the accused with the commission of the crime, and not merely show its commission: Childers v. State, 52 Ga. 106; Middleton v. State, 52 Ga. 527; McCrory v. State (Ga.), 28 S. E. 921; State v. Pepper, 11 Iowa, 347; Commonwealth v. Hayes, 140 Mass. 366, 5 N. E. 264; People v. Haynes, 55 Barb. 450; Robison v. State, 84 Tenn. (16 Lea) 146; Wright v. State, 43 Tex. 170; Jones v. State, 4 Tex. App. 436; Smith v. State, 27 Tex. App. 196, 11 S. W. 113; monographic note to Commonwealth v. Price, 71 Am. Dec. 674.

The statutory law in some of the American commonwealths declares that the unsupported testimony of an accomplice will not authorize a conviction, and that the corroboration must connect the accused with the commission of the offense, and not merely confirm the testimony of the accomplice as to the commission of the crime: Smith v. State, 59 Ala. 104; People v. Eckert, 16 Cal. 110; Chambers v.

State, 9 Iowa, 583; State v. McKinzie, 18 Iowa, 573; State v. Clemens, 38 Iowa, 257; State v. Russell, 90 Iowa, 493, 58 N. W. 890; Craft v. Commonwealth, 80 Ky. 349; People v. Ryland, 97 N. Y. 126; People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588; State v. Odell, 8 Or. 30. The Alabama statute reads: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof": Davidson v. State, 33 Ala. 350. Other states have substantially the same statute: Scott v. State, 63 Ark. 310, 38 S. W. 339; People v. Ames, 39 Cal. 403; State v. Moran, 34 Iowa, 453; Bowling v. Commonwealth, 79 Ky. 604; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026; State v. Streeter, 20 Nev. 403, 22 Pac. 758; State v. Kent, 4 N. Dak. 577, 62 N. W. 631; State v. Scott, 28 Or. 331, 42 Pac. 1; Irvin v. State, 1 Tex. App. 301; Johnson v. State (Tex. Cr. App.), 37 S. W. 327; United States v. Kershaw, 5 Utah, 618, 19 Pac. 194.

Under the above rule, the evidence relied upon for corroboration must, independently and without the aid of the testimony of the accomplice, tend to connect the defendant with the commission of the crime: State v. Welch, 22 Mont. 92, 55 Pac. 927; Hoyle v. State, 4 Tex. App. 239; Sanders v. State (Tex. Cr. App.), 29 S. W. 777; Williamson v. State, 37 Tex. Cr. App. 437, 35 S. W. 992. Testimony which tends to make the connection only when supplemented by certain testimony of the accomplice does not satisfy the law: State v. Caudette, 7 N. Dak. 109, 72 N. W. 913. It makes no difference how thorough the corroboration of the accomplice may be in regard to facts related by him, yet, unless there is some proof, independent of his testimony, tending to connect the accused with the commission of the crime, the corroboration is not sufficient: People v. Ryland, 28 Hun, 568; Chamberlain v. State (Tex. Cr. App.), 44 S. W. 495. Corroboration upon the facts and circumstances of the corpus delicti, when they have no more tendency to fix guilt upon the accused than upon anybody else, does not dispense with corroboration of that part of the testimony which goes to identify the defendant with the crime: Blois v. State, 92 Ga. 584, 20 S. E. 12.

In People v. Compton, 123 Cal. 403, 56 Pac. 44, the jury was instructed: "It is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime charged." But the supreme court said: "This instruction fails to take account of the essential character necessary to the corroborative evidence, which is that, standing alone, or, as is phrased in the code, without the aid of the testimony of the accomplice, it must tend to connect the defendant with the commission of the crime. Here the jury was told that it is sufficient if such corroborative evidence tends in any way to connect the defendant with the com-

mission of the crime. Such is not the law. It could tend to connect him with the crime by considering it with the testimony of the accomplice; yet if it is necessary so to consider, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him."

But in Short v. State (Tex. Cr. App.), 67 S. W. 114, the jury was instructed "that the facts relied upon for corroboration must tend of themselves to connect the accused with the crime charged, and must come from witnesses outside the accomplice; and in passing upon whether they have such a tendency, they must be viewed separate and distinct from the testimony of the accomplice." The appellate court held that the latter clause of the instruction is not the law.

A test is suggested in Welden v. State, 10 Tex. App. 400, and the same is approved by the supreme court of California in the recent case of People v. Morton, 139 Cal. 719, 73 Pac. 609. The following is an extract of the opinion of the Texas case: "In order to convict the defendant upon the testimony of an accomplice, there must be other evidence tending to connect the defendant with the offense. The accomplice must be corroborated by the evidence of some other witness, and this corroboration must be by proof of some fact tending to connect the defendant with the commission of the offense. The accomplice may state any number of facts, and these facts may be corroborated by the evidence of other witnesses; still, if the facts thus corroborated do not tend to connect the defendant with the crime, or if they do not point pertinently to the defendant as the guilty party, or as a participant, this would not be such a corroboration as is required by the code. We suggested this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him": See, too, People v. Ames, 39 Cal. 403.

All that the law requires is that there shall be some independent evidence fairly tending in some degree to connect the defendant with the commission of the crime. If there is such evidence, the court is bound to submit the case to the jury, who are the sole judges whether the evidence relied upon to corroborate the accomplice is sufficient: People v. Garnett, 29 Cal. 622; People v. Clough, 73 Cal. 348, 15 Pac. 5; State v. Miller, 65 Iowa, 60, 21 N. W. 181; State v. Thompson, 87 Iowa, 671, 54 N. W. 1077; State v. Chauvet, 111 Iowa, 687, 82 Am. St. Rep. 539, 83 N. W. 717; State v. Stevenson, 26 Mont. 332, 67 Pac. 1001; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62; People v. Mayhew, 150 N. Y. 346, 44 N. E. 971; Roach v. State, 8

Tex. App. 478. The requirements of the law are not that the corroborative evidence shall prove or establish the defendant's connection with the crime, but only that it shall so tend: People v. Elliott, 106 N. Y. 288, 12 N. E. 602; State v. Hicks, 6 S. Dak. 325, 60 N. W. 66. Says the supreme court of Montana: "It is not necessary that the evidence in corroboration of the accomplice must be of sufficient strength when standing alone, to connect the defendant with the commission of the crime, or to establish his guilt; if it tends in and of itself alone to prove the defendant's connection, it is sufficient": State v. Calder, 23 Mont. 504, 59 Pac. 903, citing Fort v. State, 52 Ark. 180, 20 Am. St. Rep. 163, 11 S. W. 959; People v. Grundell, 75 Cal. 301, 17 Pac. 214; State v. Russell, 90 Iowa, 493, 58 N. W. 890; Murray v. Commonwealth, 16 Ky. Law Rep. 389, 28 S. W. 480; State v. Giddes, 22 Mont. 68, 55 Pac. 919; People v. Christian, 78 Hun, 28, 29 N. Y. Supp. 271; State v. Townsend, 19 Or. 213, 23 Pac. 968.

Evidence tending to connect or identify the accused with the commission of the crime, though slight and entitled to but little consideration when standing alone, may be sufficient to corroborate an accomplice: Crittenden v. State, 134 Ala. 145, 32 South. 273; People v. McLean, 84 Cal. 480, 24 Pac. 32; Evans v. State, 78 Ga. 351. "The corroborating evidence may be slight, and entitled to but little consideration; nevertheless, the requirements of the statute are fulfilled if there is any corroborating evidence, which, of itself, tends to connect the accused with the commission of the offense": People v. Melvane, 39 Cal. 614; State v. Spencer, 15 Utah, 149, 49 Pac. 302. See, too, Nourse v. State, 2 Tex. App. 304; Jones v. State, 8 Tex. App. 575. But, observes the court in Jones v. State, 7 Tex. App. 457, "when either of these cases (Nourse's, Jones', or Melvane's) is examined, it will be seen that in fact the corroborating evidence was positive and satisfactory, not only as to material matters, but matters which could not be explained consistently with the innocence of the accused."

c. **Circumstantial Evidence.**—Corroborating evidence need not be direct and positive. Circumstantial evidence, which tends to connect the defendant with the commission of the crime charged, is sufficient and fulfills the requirements of the law: State v. Stanley, 48 Iowa, 221; State v. Jones, 115 Iowa, 113, 88 N. W. 196. See, also, State v. Thornton, 26 Iowa, 79, Boyce v. People, 55 N. Y. 644.

d. **Confessions, Admissions, and Declarations.**—A confession of the defendant is admissible, and may be sufficient, to corroborate the testimony of an accomplice: Crittenden v. State, 134 Ala. 145, 32 South. 273; Partee v. State, 67 Ga. 570; Shaefer v. State, 93 Ga. 177, 18 S. E. 552; Patterson v. Commonwealth, 86 Ky. 313, 5 S. W. 387, 765. And in determining the weight and credibility of such confession, the jury may believe part of it and reject the rest:

Snoddy v. State, 75 Ala. 23. Moreover, admissions made by the accused which strongly tend to connect him with the crime for which he is on trial may constitute a sufficient corroboration: People v. Cleveland, 49 Cal. 577.

But an accomplice cannot corroborate himself by his own words or deeds. The corroboration must come from an independent source: State v. Kent, 4 N. Dak. 577, 62 N. W. 631; Brown v. State (Tex. Cr. App.), 76 S. W. 475. Statements made by him in the absence of the party against whom he testifies are insufficient: Clay v. State, 40 Tex. Cr. Rep. 556, 51 S. W. 212; so are statements made at another time, unless, perhaps, his testimony has been impeached: United States v. Wilson, Baldw. 78, Fed. Cas. No. 16,730. Evidence that an accomplice has stated out of court that which he has testified to is not corroboration: State v. Scott, 15 S. C. 434. And an accomplice cannot testify to one fact and corroborate this by testimony as to another: Jernigan v. State, 10 Tex. App. 546. Nor can he be corroborated by evidence that he has previously pleaded guilty to the identical offense: Branson v. State, 99 Ga. 194, 24 S. E. 404. But, while an accomplice cannot corroborate himself, the state may introduce through him all matters of probative force in the case to which he can testify for the purpose of strengthening his testimony: State v. Kent, 5 N. Dak. 516, 67 N. W. 1052.

e. Persons Giving the Testimony.

1. **Other Accomplices.**—It has been seen in the preceding paragraph that an accomplice cannot corroborate his own testimony. It is also held that one accomplice cannot corroborate another accomplice in the same crime: People v. Creegan, 121 Cal. 554, 53 Pac. 1082; Johnson v. State, 4 G. Greene (Iowa), 65; Porter v. Commonwealth, 22 Ky. Law Rep. 1657, 61 S. W. 16; Howard v. Commonwealth, 22 Ky. Law Rep. 1845, 61 S. W. 756; Gonzales v. State, 9 Tex. App. 374; Blakely v. State, 24 Tex. App. 616, 5 Am. St. Rep. 912, 7 S. W. 233; United States v. Hinz, 35 Fed. 272. Probably corroboration from an independent source is not dispensed with by testimony from any number of accomplices: People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588, and authorities cited. "Merely adding to the number of broken reeds gives no increase of strength. The confirmation required to give the testimony of an accomplice the necessary weight should come from an unimpeached source, not from partners in guilt": State v. Williamson, 42 Conn. 261.

2. **The Wife of an Accomplice** is a competent witness to corroborate his testimony: Edmonson v. State, 51 Ark. 115, 10 S. W. 21; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; Blackburn v. Commonwealth, 75 Ky. (12 Bush) 181; Haskins v. People, 16 N. Y. 344; Dill v. State, 1 Tex. App. 278. "The American authorities generally support the view that the testimony of the wife may be satisfactory and sufficient corroboration of her husband, who testifies as an ac-

complice, within the discretion of the jury, so as to warrant a conviction, in cases where such corroboration is requisite. The fact of relationship, and the danger of marital domination on the part of the husband, go, it is true, largely to assail the credibility of the wife, but not to her competency; and the degree of weight which should be accorded to her testimony must be left to the jury. It may sometimes constitute very weak corroboration, yet it cannot justly be said to be absolutely no corroboration at all. The case bears no similitude to that of an accomplice, whose testimony, it has been said, cannot confirm that of an other accomplice in the same crime. The reason is, that each is contaminated by the turpitude of the same guilt, and the same infirmity, therefore, attaches alike to the testimony of both": Woods v. State, 76 Ala. 35, 52 Am. Rep. 314.

f. **Questions for Court and Jury.**—Whether or not there is any evidence corroborative of the testimony of an accomplice is a question for the court: State v. Miller, 65 Iowa, 60, 21 N. W. 181; State v. Van Winkle, 80 Iowa, 15, 45 N.W. 388. But the weight, sufficiency, credibility, and effect of such evidence is a question exclusively for the jury under proper instructions from the court: State v. Deitz, 67 Iowa, 220, 25 N. W. 141; Hamilton v. People, 29 Mich. 173; People v. Shaver, 107 Mich. 562, 65 N. W. 538; State v. Streeter, 20 Nev. 403, 22 Pac. 758; United States v. Neverson, 1 Mackey, 152.

IV. Convictions of Particular Crimes.

a. **Felonies and Misdemeanors Generally.**—It has been held that the rule that the uncorroborated testimony of an accomplice, where that rule prevails, will not authorize a conviction, does not apply to misdemeanors: Crisson v. State, 51 Ga. 597; Askea v. State, 75 Ga. 356; Roundtree v. State, 88 Ga. 457, 14 S. E. 712; Grant v. State, 89 Ga. 393, 15 S. E. 488; Truss v. State, 81 Tenn. (13 Lea) 311. It will be observed from the principal case (ante, p. 145), that the statutes of Georgia requiring the corroboration of the testimony of an accomplice to be corroborated applies only to felonies. The same seems to be true of the statutes of Arkansas: Scott v. State, 63 Ark. 310, 38 S. W. 339. An earlier statute of that state, however, which in general terms makes corroboration necessary, is held to apply to misdemeanors as well as to felonies: State v. Davis, 38 Ark. 581. In the absence of any statutory law on the question, it has already been pointed out that a conviction can be had on the unsupported testimony of an accomplice. And in the application of this rule no distinction seems to be drawn between felonies and misdemeanors.

b. **Burglary and Robbery.**—One may be legally convicted of the crime of burglary on the unsupported evidence of an accomplice: State v. Jackson, 106 Mo. 174, 17 S. W. 301; State v. Minor, 117 Mo.

302, 22 S.W. 1085. In many jurisdictions, however, where the legislature has changed the common-law rules of accomplice testimony, it is necessary to corroborate the accomplice by independent evidence tending to connect the accused with the commission of the burglary: Johnson v. State, 92 Ga. 577, 20 S. E. 8; State v. Levars, 12 S. Dak. 265, 81 N. W. 294; Price v. State (Tex. Cr. App.), 58 S. W. 83; Barber v. State (Tex. Cr. App.), 70 S. W. 210. For authorities discussing the sufficiency of the corroborative evidence in burglary cases, see Fort v. State, 52 Ark. 180, 20 Am. St. Rep. 163, 11 S. W. 959; Ford v. State, 70 Ga. 722; Pritchett v. State, 92 Ga. 33, 18 S. E. 350; State v. Graff, 47 Iowa, 384; Murray v. Commonwealth, 16 Ky. Law Rep. 389, 28 S. W. 480; Buchannan v. State (Tex. Cr. App.), 24 S. W. 895. After proof of the corpus delicti, the testimony of an accomplice is sufficiently corroborated by other evidence that two days after the commission of the burglary the defendant was in possession of the goods, such possession not being satisfactorily explained, and the jury being satisfied upon the whole evidence of his guilt: Boswell v. State, 92 Ga. 581, 17 S. E. 805.

The same general rules governing accomplice testimony in burglary cases are applicable to the crime of robbery. The sufficiency of the corroborative evidence where the defendant is charged with that offense is considered in People v. Lynch, 122 Cal. 501, 55 Pac. 248; State v. Mikesell, 70 Iowa, 176, 30 N. W. 474. An accomplice is not corroborated by testimony that about the time the crime was committed the defendant was seen going toward the store of the person who was robbed, where the parties often visited: Smith v. Commonwealth, 13 Ky. Law Rep. 369, 17 S. W. 182.

c. **Larceny and Receiving Stolen Goods.**—In many states there can, under the statutes, be no conviction of larceny upon the unsupported testimony of an accomplice. As to the sufficiency of the corroborative evidence, in prosecutions for larceny, see People v. Grundell, 75 Cal. 301, 17 Pac. 214; People v. Armstrong, 114 Cal. 570, 46 Pac. 611; People v. Ardell (Cal.), 66 Pac. 970; State v. Blain, 118 Iowa, 466, 92 N. W. 650; State v. Townsend, 19 Or. 213, 23 Pac. 968; Buchanan v. State, 25 Tex. App. 546, 8 S. W. 665; Roguemore v. State, 28 Tex. App. 55, 11 S. W. 834; Wright v. State (Tex. Cr. App.), 44 S. W. 151. It is held that the issue of ownership of the property stolen is a point upon which there must be confirmation of the testimony given by the accomplice: Crowell v. State, 24 Tex. App. 404, 6 S. W. 318; Hanson v. State, 27 Tex. App. 140, 11 S. W. 37. And the testimony of the accomplice must be corroborated, not merely by showing that the crime charged was committed, but must also show the defendant's complicity therein; and where the original taking is the material part of the case, the accomplice must be corroborated on that particular point: Boyd v. State, 24 Tex. App. 570, 5 Am. St. Rep. 908, 6 S. W. 853. In Tave

v. State (Tex. Cr. App.), 44 S. W. 178, it is decided that one is not an accomplice whose testimony must be corroborated, when, seeing the defendant take a chicken from an ice-chest, he immediately afterward takes one himself, there being no complicity between them. But one who agrees with the defendant to steal, and assists in the taking, and is not shown to have abandoned the original purpose until a short time prior to the taking, when he communicated the agreement to others, is an accomplice: McKenzie v. State (Tex. Cr. App.), 32 S. W. 543.

If the crime of larceny and the crime of receiving stolen goods are considered separate and distinct offenses, then the thief and the receiver are not accomplices, and either may be convicted of the offense he has committed on the uncorroborated testimony of the other: Springer v. State, 102 Ga. 447, 30 S. E. 971 (compare Roberts v. State, 55 Ga. 220); State v. Kuhlman, 152 Mo. 100, 75 Am. St. Rep. 438, 53 S. W. 416; State v. Rachman, 68 N. J. L. 120, 53 Atl. 1046, People v. Cook, 5 Park. Cr. Rep. (N. Y.) 351; and the same is true as between a burglar and the one receiving the goods stolen (State v. Hayden, 45 Iowa, 11), and as between a robber and the receiver of the goods: Harris v. State, 75 Tenn. (7 Lea) 124. There are authorities, however, which regard the thief and the receiver of the stolen goods as accomplices within the rules of accomplice testimony: People v. Kraker, 72 Cal. 459, 1 Am. St. Rep. 65, 14 Pac. 196; Walker v. State (Tex. Cr. App.), 37 S. W. 423. This is the logical outcome of taking the word "accomplice" in its loose sense—that is, as anyone connected with the crime charged.

As to the sufficiency of the corroboration of an accomplice when one is on trial for receiving stolen goods knowing them to be stolen, see Jefferson v. State, 110 Ala. 89, 20 South. 434; Bismarck v. State (Tex. Cr. App.), 73 S. W. 965. The corroborative evidence in such a case need not be sufficient of itself, without the aid of the testimony of the accomplice, to establish the requisite guilty knowledge: People v. Solomon (Cal.), 58 Pac. 55.

d. **Escape of Prisoners.**—One who uses tools taken to a jail for the aid of his fellow-prisoners to escape is not necessarily an accomplice in the conveyance of such tools within the rules of accomplice testimony: Peeler v. State, 3 Tex. App. 533. Nor is a prisoner an accomplice of a person, within such rules, whom he procures to convey into the jail an instrument to facilitate the escape of the prisoner: Ash v. State, 81 Ala. 76, 1 South. 558. But it is held that a prisoner who assists the defendants to liberate others from confinement, and himself escapes, though the original plan did not contemplate his escape, is an accomplice in the rescue, who must be corroborated: Hillian v. State, 50 Ark. 523, 8 S. W. 834. Parties who aid the principal in a crime to elude punishment, but not to evade capture or escape, are not accomplices, and they may corroborate the

principal's testimony against an accomplice: People v. Dunn, 53 Hun, 381, 6 N. Y. Supp. 805.

e. **Gambling and Wagering.**—In Commonwealth v. Bossie, 100 Ky. 151, 37 S. W. 844, it is decided that players at an unlawful game of cards are each guilty of a separate offense, and are not accomplices to be corroborated. And in Stone v. State, 3 Tex. App. 675, it is decided that betters at faro, monte, pool, and the like are several offenders, and not accomplices to be corroborated. A statute providing that in prosecutions for gaming a conviction may be had on the unsupported testimony of an accomplice or participant is constitutional: Wright v. State, 23 Tex. App. 313, 5 S. W. 117.

In some states those who play together in a game of cards which offends the law are accomplices within the rules of accomplice testimony: Davidson v. State, 83 Ala. 350; Smith v. State, 37 Ala. 472; State v. Davis, 38 Ark. 581. And it is held that one who does not himself play cards, but who is in partnership with one of the players, and advances money to be used in betting, is an accomplice who must be corroborated: English v. State, 5 Ala. 428. So, the dealer in a game of stud-poker has been held an accomplice with those betting at the game: State v. Light, 17 Or. 358, 21 Pac. 132. But one who joins in a game of tenpins, but does not participate in the betting, is held not to be an accomplice: Bass v. State, 37 Ala. 469. And a stakeholder is not an accomplice where money is bet on an election: Schwartz v. State (Tex. Cr. App.), 40 S. W. 976. A policeman who frequents a gaming-table, and then exposes the gambling, is not an accomplice as a matter of law: Commonwealth v. Baker, 155 Mass. 287, 29 N. E. 512.

f. **Forgery and Uttering Forged Paper.**—The uncorroborated testimony of an accomplice will, if there has been no statutory change in the law of accomplice testimony, support a conviction for forgery: State v. Tobie, 141 Mo. 547, 42 S. W. 1076. But that rule has been changed in many states, as has already been seen. See Preston v. State (Tex. Cr. App.), 53 S. W. 127, for the sufficiency of the corroborative evidence. And in Texas, where it has been changed, it is held that parties forging an instrument are so far the accomplices of the person uttering it as to require confirmation in a prosecution for uttering such instrument: Preston v. State, 40 Tex. Cr. App. 72, 48 S. W. 581.

g. **Perjury and Subornation—False Swearing.**—It has been held that a conviction of subornation of perjury should not be had upon the unsupported testimony of the person suborned: State v. Fahey (Del.), 54 Atl. 690. See, also, People v. Evans, 40 N. Y. 1; Blakely v. State, 24 Tex. App. 616, 5 Am. St. Rep. 912, 7 S. W. 233. See the comment on the New York decision in the principal case (ante, p. 145), where it is held, and properly it is believed, that the suborner

is not an accomplice of the perjurer, and may be convicted on the latter's uncorroborated testimony. So, in United States v. Thompson, 31 Fed. 331, it is decided that the person solicited to commit perjury is not an accomplice in the crime of subornation committed by the person who suborned him; and the fact that he committed the perjury does not preclude the jury from convicting the suborner on his testimony. And a similar conclusion is reached in State v. Benswick, 85 Minn. 19, 88 N. W. 22, from which the following is an extract: "The completed crime of subornation of perjury consists of two essential elements—the commission of perjury by the person suborned, and the willfully procuring or inducing him to do so by the suborner. As to the first element of the crime, the suborned and the suborner are principals by virtue of the statute, and necessarily each is the accomplice of the other; hence, this element of the crime cannot be established by the uncorroborated evidence of the suborned. But as to the second element of the crime, the suborned is neither a principal nor an accomplice, for legally he cannot be guilty of persuading himself to commit perjury. An indictment of a party for inducing himself to commit a crime would be a legal absurdity. The conclusion logically follows that if, in the prosecution of a party for subornation of perjury, it is sought to establish the fact that perjury was committed by the testimony of the person committing it, his testimony must be corroborated as to such fact, because as to the perjury he is an accomplice. But the alleged fact that he was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt."

Where, in a prosecution for false swearing, it appears that the defendant and a girl eloped to get married, and at about the same time each made an affidavit as to her age, knowing the affidavit necessary to obtain a license to marry, she is held to be an accomplice within the law of accomplice testimony in Smith v. State, 37 Tex. Cr. Rep. 488, 36 S. W. 586.

h. **Bribery and Compounding Crime.**—A person offering, giving, or paying a bribe is an accomplice with the person receiving it, within the rules of accomplice testimony: State v. Carr, 28 Or. 389, 42 Pac. 215; Ruffin v. State, 36 Tex. Cr. App. 565, 38 S. W. 169; Collins v. State (Tex. Cr. App.), 51 S. W. 216. See, also, People v. O'Neil, 109 N. Y. 251, 16 N. E. 68; People v. Winant, 53 N. Y. Supp. 695, 24 Misc. Rep. 361; People v. Bissert, 75 N. Y. Supp. 630, 71 App. Div. 118, affirmed in 172 N. Y. 643, 65 N. E. 1120.

But the case is otherwise as between those who give and receive money for compounding a crime where the statute which forbids the receiving is silent as to the criminality of the giving. Thus it is held that in a prosecution for taking money, upon a contract to withhold evidence of a criminal offense, the person who makes the

agreement with, and pays the money to, the defendant is not an accomplice to be corroborated: State v. Quinlan, 40 Minn. 55, 41 N. W. 299.

i. **Sale of Intoxicating Liquor.**—The testimony of one who purchases liquor at an unlawful sale thereof is not considered that of an accomplice in a prosecution of the seller: State v. Teahan, 50 Conn. 92; People v. Smith, 28 Hun, 626; Sears v. State, 35 Tex. Cr. Rep. 442, 34 S. W. 124; Terry v. State (Tex. Cr. App.), 71 S. W. 968; Walker v. State (Tex. Cr. App.), 72 S. W. 401. And this is true notwithstanding he makes the purchase for the purpose of obtaining evidence and prosecuting the vendor. This fact is material only as showing the interest or animus of the witness, and as affecting his credibility: Commonwealth v. Mason, 135 Mass. 555; State v. Baden, 37 Minn. 212, 34 N. W. 24. A master who gives his slave money to buy liquor to detect the vender is within the foregoing rules: Harrington v. State, 36 Ala. 236.

In Bolton v. State (Tex. Cr. App.), 43 S. W. 984, it is held that the fact that the defendant in a prosecution for violating the local option law is the renter of the premises where the business is conducted, and owns the goods there, sufficiently corroborates the testimony of one jointly indicted that the business was conducted for the defendant.

j. **Murder.**—Unless a different rule is prescribed by statute, a conviction of murder may be had on the uncorroborated testimony of an accomplice: Campbell v. State, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; State v. Black, 143 Mo. 166, 44 S. W. 340. As to the sufficiency of the corroboration in murder cases where this rule has been abrogated by the legislature, see People v. Smith, 98 Cal. 218, 33 Pac. 58; State v. Clauser, 69 Iowa, 313, 28 S. W. 615; Garrett v. State, 41 Tex. 530; Stourad v. State, 27 Tex. App. 1, 10 S. W. 442; Red v. State (Tex. Cr. App.), 53 S. W. 618; Smith v. State (Tex. Cr. App.), 68 S. W. 267.

k. **Rape.**—A conviction of rape or an assault to commit rape may be had on the uncorroborated testimony of the prosecutrix, in the absence of a statute prescribing otherwise: Doyle v. State, 39 Fla. 155, 63 Am. St. Rep. 159, 22 South. 272; State v. Anderson, 6 Idaho, 706, 59 Pac. 180; Johnson v. People, 197 Ill. 48, 64 N. E. 286; State v. Harris, 150 Mo. 56, 51 S. W. 481; State v. Peres, 27 Mont. 358, 71 Pac. 162; State v. Knighten, 39 Or. 63, 37 Am. St. Rep. 647, 64 Pac. 366; State v. Roller, 30 Wash. 692, 71 Pac. 718; Tway v. State, 7 Wyo. 74, 50 Pac. 188. And the fact that she is under the age of consent, and perhaps voluntarily yields to the intercourse, does not change the rule. She is a victim, rather than an accomplice, and her testimony is not subject to the rules of accomplice testimony: Bond v. State, 63 Ark. 504, 58 Am. St. Rep. 129, 39 S. W. 554; State

v. Wilcox, 111 Mo. 569, 33 Am. St. Rep. 551, 20 S. W. 314; State v. Tuttle, 67 Ohio St. 440, 93 Am. St. Rep. 689, 66 N. E. 524; Hamilton v. State, 36 Tex. Cr. App. 372, 37 S. W. 431; Smith v. State (Tex. Cr. App.), 73 S. W. 401; State v. Hilberg, 22 Utah, 27, 61 Pac. 215; Lanphere v. State, 114 Wis. 193, 89 N. W. 128. Nor is the case different where there is more than one act of copulation, and the intercourse is continued for some length of time: Danley v. State (Tex. Cr. App.), 71 S. W. 958.

l. **Sodomy.**—Where a participant in the crime against nature consents to the act, he is regarded as an accomplice, and his testimony is subject to the rules of accomplice testimony: People v. Deschessere, 74 N. Y. Supp. 761, 69 App. Div. 217; Medis v. State, 27 Tex. App. 194, 11 Am. St. Rep. 192, 11 S. W. 112. In the jurisdictions where these cases were decided the statute requires the testimony of an accomplice to be corroborated, and this statutory requirement was held applicable to the crime in question. And in Regina v. Jellyman, 8 Car. & P. 604, 34 Eng. Com. L. 916, it is also held that one consenting to the offense is an accomplice whose unconfirmed testimony will not support a conviction of the other participant. In Houselman v. People, 168 Ill. 172, 48 N. E. 304, however, it is decided that the unsupported testimony of an accomplice in the crime against nature may be legally sufficient to support a conviction. This ruling is simply an application of the common-law rule as to the sufficiency of the testimony of an accomplice.

m. **Incest.**—A woman who voluntarily yields herself to an incestuous intercourse is regarded as an accomplice with the man, and her testimony is governed by the law of accomplice testimony: Solomon v. State, 113 Ga. 192, 38 S. E. 332; State v. Kellar, 8 N. Dak. 563, 73 Am. St. Rep. 776, 80 N. W. 476; Shelly v. State, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; Freeman v. State, 11 Tex. App. 92, 40 Am. Rep. 787; Dodson v. State, 24 Tex. App. 514, 6 S. W. 548; Blanchette v. State, 29 Tex. App. 46, 14 S. W. 392; Stewart v. State, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35, 32 S. W. 766; Clark v. State, 39 Tex. Cr. Rep. 179, 73 Am. St. Rep. 918, 45 S. W. 576; Ratliff v. State (Tex. Cr. App.), 60 S. W. 666. But it is otherwise, if she is the victim of force, threats, duress, fraud, or undue influence, so that she does not join in the intercourse with the same intent that he does: Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 South. 306; State v. Kouhns, 103 Iowa, 720, 73 N. W. 353; Schwartz v. State (Neb.), 91 N. W. 190; Mercer v. State, 17 Tex. App. 452; Mullinix v. State (Tex. Cr. App.), 26 S. W. 504; Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061. In Whittaker v. Commonwealth, 95 Ky. 632, 27 S. W. 83, it is held that a father may be convicted of incest with his minor daughter on her unsupported testimony, though, perhaps, she consented, for she was not his accomplice, but his victim. Where the common-law rule concerning

accomplice testimony prevails, a conviction for incest may be had on the uncorroborated evidence of the female, although she is an accomplice: Brown v. State, 42 Fla. 184, 27 South. 869. For decisions considering the sufficiency of the corroborative evidence in prosecutions for incest, see State v. Streeter, 20 Nev. 403, 22 Pac. 758; State v. Jarvis, 20 Or. 427, 23 Am. St. Rep. 141, 26 Pac. 302; Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640; Ceasar v. State (Tex. Cr. App.), 29 S. W. 785.

n. **Seduction.**—The prosecutrix in seduction is sometimes spoken of as an accomplice whose testimony must be corroborated to warrant a conviction: McCullar v. State, 36 Tex. Cr. Rep. 213, 61 Am. St. Rep. 847, 36 S. W. 385. That she must be corroborated in order that a conviction may be had, is the law in many jurisdictions: Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 South. 66; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Mills v. Commonwealth, 93 Va. 815, 22 S. E. 863. But to say that she is an accomplice of the man who accomplishes her ruin is absurd, and it is not the law: Keller v. State (Ga.), 31 S. E. 92.

o. **Adultery and Fornication.**—It seems to be considered in Merritt v. State, 10 Tex. App. 402, 12 Tex. App. 203, that in a prosecution for adultery the woman, although an unwilling participant in the intercourse, is an accomplice whose testimony is subject to the rules of accomplice evidence. But in adultery, the woman may or may not be an accomplice. If, by consenting to the act, she too is guilty of adultery, she is an accomplice; but if the act is against her will, she is free from guilt, and therefore not an accomplice": State v. Henderson, 84 Iowa, 161, 50 N. W. 758. As to the sufficiency of the evidence relied upon to corroborate the woman in adultery and fornication, see Wiley v. State, 33 Tex. Cr. App. 406, 26 S. W. 723; Henderson v. State (Tex. Cr. App.), 44 S. W. 504; State v. Collett, 20 Utah, 290, 58 Pac. 684; State v. Seiler, 106 Wis. 346, 82 N. W. 167; Seiler v. State, 112 Wis. 293, 87 N. W. 1072.

p. **Abortion.**—There is a holding in People v. Josselyn, 39 Cal. 393, to the effect that testimony of a woman on whom an abortion is charged to have been made must be corroborated as to some of the material facts which constitute a necessary element of the offense. So, there is a holding in State v. McCoy, 52 Ohio St. 157, 39 N. E. 316, to the effect that the woman's testimony should be regarded as that of an accomplice where the statute makes her an aider and abettor of the principal offender if she voluntarily participates in the abortion. Generally speaking, however, the woman, although consenting, cannot be regarded as an accomplice within the law of accomplice testimony: State v. Smith, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; Peoples v. Commonwealth, 87 Ky. 487, 9 S. W. 509, 810; Commonwealth v. Boynton, 116 Mass. 343;

Commonwealth v. Follansbee, 155 Mass. 274, 29 N. E. 471; State v. Owens, 22 Minn. 238; State v. Hyer, 39 N. J. L. 598; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; People v. Vedder, 98 N. Y. 630; Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341; Miller v. State, 37 Tex. Cr. App. 575, 40 S. W. 313; Hunter v. State, 38 Tex. Cr. App. 61, 41 S. W. 602. Compare Wandell v. State (Tex. Cr. App.), 25 S. W. 27. Although perhaps her implication is a proper consideration for the jury in weighing her testimony: Watson v. State, 9 Tex. App. 237; Willingham v. State, 33 Tex. Cr. App. 98, 25 S. W. 424. A friend of the woman who knows of her pregnancy, and accompanies her to the house where the abortion is committed, but does not advise or aid the person who commits it and is not present in the room when it is done, is not an accomplice of such person: People v. McGonegal, 136 N. Y. 62, 32 N. E. 616.

EVANS v. EVANS.

[118 Ga. 890, 45 S. E. 612.]

GIFT TO WIFE—Adultery as a Ground for Revocation.—For a wife to induce her husband to convey property to her after she has been guilty of adultery, or in contemplation of such subsequent adultery, is such fraud as entitles him to revoke the gift on discovering her conduct. (pp. 183, 184.)

W. D. Sheffield and Russell & Fleming, for the plaintiff in error.

Townsend & Dickenson and Harrell & Hartsfield, for the defendant in error.

891 LAMAR, J. There is some conflict in the evidence, but the chancellor having found in favor of the husband, it may be assumed, for the purposes of this hearing, that the land was purchased partly with the husband's earnings and partly with the proceeds of other land paid for by him; that at the earnest solicitation of the wife the title to all property when bought, and the deed to the land in controversy, were made directly to her, for the purpose of avoiding the expense of administration and guardianship in case the husband died first; that she was to make a will devising all the property to the husband, for the purpose of saving like expenses in case she died first; that at all times the wife deferred to the husband in reference to the management and control of the property,

and recognized his right to say when and at what price it should be sold; and that two thousand five hundred dollars in cash was earned by the husband, and with his consent deposited in the bank of Moultrie by the wife in her own name. It is nowhere denied that shortly before her elopement the wife purchased an Atlanta check for two thousand five hundred dollars with the money in the Bank of Moultrie, and that she endeavored to sell the two city lots in Americus at a price much below their value; and it appears that she instructed the real estate agent to conceal the fact of the intended sale from her husband; that she eloped in July, 1903, with Thrash; that they were arrested and brought back to Bainbridge; that she was released on bond, but Thrash for want of a bond was committed to jail on a charge of fornication and adultery; and that she furnished him some money and delicacies while in jail. The evidence for the husband tended to show that without his knowledge illicit relations had existed between his wife and Thrash for years; that both before and after the execution of the deeds and the deposit of the money this criminal intimacy was in progress. The answer and evidence of the wife make counter-charges and recriminations, and, while admitting the elopement, she denies that she had ever been guilty of adultery with Thrash prior to the execution of the deeds, and denies that they were made for the purpose of being sold and the proceeds used to support herself and Thrash. She denies that there was any agreement to make a will in favor of her husband, and insists that the gifts were intended to be absolute and without condition or limitation. 892 The petition prayed for an injunction to restrain the wife from disposing of the property, for the appointment of a receiver to manage it until a final hearing, and for a decree canceling the deeds and vesting title to the real estate and money in the husband. At the interlocutory hearing the court granted the prayer for injunction and receiver.

The instinctive feeling that a gift from a husband to a wife should be revoked on his discovery that she is an adulteress cannot change the fact that courts are bound to preserve property rights, and have no power to impose penalties, even conviction for crime working no corruption of blood or forfeiture of estate: Civ. Code, sec. 5725. At the time when divorces were granted by act of parliament there was usually incorporated in the private bill a provision which determined what disposition should be made of the property. Under the old

law, by which the husband became the owner of the wife's property, a divorce a vinculo restored to her the property of which he was seised by virtue of the marriage. In cases of marriage settlements, where children and remaindermen might be interested, and where the rights of the parties were fixed by the terms of the settlement and did not arise by operation of law, it has been held that the interests vested thereunder were not affected by the subsequent misconduct of either party: Fitzgerald v. Chapman, L. R. 1 Ch. Div. 563, where Jessel, M. R., declined to follow Lord Romilly in Fussell v. Dowling, L. R. 14 Eq. 423, and Stuart, V. C., in Jessop v. Blake, 3 Giff. 639. The decisions are not uniform as to the effect of misconduct where there has been a deed of gift from one to the other. Some courts hold that without a stipulation that the gift is to remain of force only during the marriage, it will not be revoked for subsequent adultery of the wife: Lister v. Lister, 35 N. J. Eq. 49.

On the other hand, it might with great force be argued that adultery is the most serious of matrimonial offenses; that it poisons the marriage relation, depriving the wife of dower and the right to necessaries (Civ. Code, sec. 4689, par. 6, 2478); that as it would be insulting and indecent to incorporate in a deed of gift a provision [893] making it void if the wife should be guilty of that crime, the husband must be supposed to have given and the wife to have accepted with the implied condition that the property should not be used for the support of the paramour, or for the maintenance of one who had not only violated the vows under which he had promised to endow her with his worldly goods, but had outraged him as a man, and repudiated him as a husband; that the real consideration of such a conveyance was marriage and the continuance of the married state, which failed when by such an act the relation was rendered intolerable. And it is probably for these or similar reasons that the rule in Fitzgerald v. Chapman, L. R. 1 Ch. Div. 563, was in large measure changed by act of parliament. In Scotland the offender's claims under antenuptial and postnuptial contracts are forfeited; and at the civil law the guilty party loses all advantages conveyed by the other, whether by contract of marriage or since the marriage: Code Napoleon, sec. 299.

Even where there was no adultery, but the wife by importunity induced the husband to convey to her certain real estate, and three years thereafter abandoned him without cause, the

supreme court of Nebraska, in Dickerson v. Dickerson, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429, held that the husband was entitled to a reconveyance, and that the wife would not be permitted, under such circumstances, to retain title to real estate conveyed at her instance, as a provision for her support in case of his death. But it is not necessary in this case to determine what would be the effect on the gift here if it be shown that the adultery occurred after the deed was executed, because as to all conflicting evidence the finding of the judge must be construed most favorably to the prevailing party, and there was evidence from which he could have found that, without the husband's knowledge, illicit relations between the wife and Thrash had begun prior to the time the money was deposited in her name, and before the husband bought the property and instructed the grantors to make the deeds directly to her; and also that she contemplated a renewal of the intercourse with Thrash. There seems to be no doubt that a gift made under such circumstances will be revoked at the instance of the husband on discovery of the wife's criminal conduct. In Evans v. Carrington, 2 De Gex, F. & G. (63 Eng. Ch.) 481, where there was a deed of separation, Lord Campbell held that while nondisclosure of antenuptial incontinence by 894 the wife was not such a fraud on the husband as to entitle him to set aside a settlement made at the time of the marriage (compare Civ. Code, sec. 2425, par. 5), yet it would seem that adultery after the marriage and before separation would void the separation deed; and likewise if the wife induced her husband to execute a conveyance in contemplation of her renewal of the illicit intercourse, this would also invalidate the deed of separation.

That the adultery of the wife, unknown to the husband, would vitiate a subsequent gift, seems also to be recognized in Lister v. Lister, 35 N. J. Eq. 58; Chew v. Chew, 38 Iowa, 405.

While the wife could hardly be expected to disclose her criminal intimacy with Thrash, yet it is certain that the husband would not have made the gift had he known of the illicit relations. And for her to induce her husband to convey the property to her after she had been guilty of adultery, or in contemplation of subsequent adultery with Thrash, was such a fraud upon the husband as to entitle him to revocation of the gift on discovery of her conduct: Civ. Code, sec. 3534, pars. 1, 2. This conclusion makes it unnecessary to discuss what was the effect of her failure to make a will, or whether a resulting trust arose in favor of the husband because he paid the pur-

chase money and directed the conveyance to the wife on the understanding that the property was to be used for the family during their joint lives, and wife and children after his death, or for his use in case of her prior death: Civ. Code, secs. 3159, par. 1. 3160.

Cited for the wife: Finlayson v. Finlayson, 17 Or. 347, 11 Am. St. Rep. 836, 21 Pac. 57; for the husband: Meldrum v. Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65, and cases in the notes. In addition to which see Bazemore v. Davis, 55 Ga. 506 (13); Baggs v. Baggs, 54 Ga. 95; Greenwood v. McBride, 11 Ga. 379; Evans v. Carrington, 63 Eng. Ch. 481, 491, 501; Charlesworth v. Holt, L. R. 9 Ex. 38; Stultz v. Stultz, 107 Ind. 402, 8 N. E. 238; Lister v. Lister, 35 N. J. Eq. 49; Walton v. Smith, 70 Vt. 19, 39 Atl. 252; Snodgrass v. Snodgrass, 40 Kan. 494, 20 Pac. 203, 3 P. Wms. 269, 276; Stone v. Wood, 85 Ill. 603 (4); 2 Bishop on Marriage, Divorce and Separation, 6th ed., secs. 1654-1659, p. 509 (a). There was no error in enjoining the wife from disposing of the property, or in appointing the receiver to hold the same until final decree.

Judgment affirmed.

All the justices concur.

As Supporting the Principal Case, see Dickerson v. Dickerson, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

ROHN v. ROHN.

[204 Ill. 184, 68 N. E. 369.]

EXECUTORS DE SON TORT.—What facts constitute one an executor de son tort is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury. (p. 188.)

EXECUTORS DE SON TORT.—One who takes charge of an estate at the request of the intestate, who does not desire administration thereon, must hold and account therefor to the widow and minor heirs in the proportion fixed by statute, and an attempt to carry out the instructions of the intestate for a different disposition of the estate makes him an executor de son tort. (p. 189.)

EXECUTORS DE SON TORT—Duties of.—One who attempts to take charge of and distribute an intestate estate without administration must exercise the same diligence in the collection of debts due the estate as though he were a regularly appointed administrator. (p. 189.)

EXECUTORS DE SON TORT.—Acts of Kindness or Charity not creating liability as an executor de son tort are limited to such acts as directing a funeral, paying funeral expenses, preserving of the estate from loss or waste, and the like. (p. 189.)

EXECUTORS DE SON TORT—Estoppel—Setoff.—In an action at law by a widow to enforce a liability of a person as executor de son tort of her husband's estate, the questions whether she is estopped to recover or whether the amount claimed should be taken from her share of the estate cannot be litigated, as they must be determined in a court of equity. (p. 190.)

L. A. Heile and J. S. Huey, for the appellant.

H. P. Heizer, for the appellee.

185 CARTWRIGHT, J. Appellee, Ida Rohn, as administratrix of the estate of her deceased husband, William Rohn,

Jr., recovered a judgment in the superior court of Cook county for $1,762.50 against appellant, Wiliam Rohn, father of said William Rohn, Jr., as executor de son tort of said estate, in an action on the case for negligence in failing to collect a note of $1,500 against George Wildner, which appellant had in his hands. The branch appellate court for the first district affirmed the judgment.

The material facts appearing on the trial are as follows: William Rohn, Jr., was a partner of George Wildner in the manufacture of furniture in Chicago, and having long been ill with a fatal disease, he attempted to arrange his business affairs and property in view of his [186] approaching death. He had no real estate and no debts, and was averse to having his estate probated. To carry out his arrangement he entered into a contract with Wildner for the sale of his interest in the partnership to Wildner for $8,500, on which $6,000 was to be paid in cash or securities and Wildner was to give his notes for the remainder, one for $1,000 and the other of $1,500. Wildner had $1,600 in mortgages and was going to raise $400 to make up $2,000. He arranged to borrow $2,000 from his mother and $2,000 from Rudolph Rohn, brother of the defendant, for the purpose of paying the $6,000. William Rohn, Jr., executed a bill of sale of his share of the partnership, dated September 28, 1893, and gave it to his wife, Ida Rohn, to be delivered upon compliance with the terms of sale. When the contemplated sale should be carried out, his estate would amount to $11,000, which was all in personal property, and he said that he wanted to secure to his wife $5,000 of that sum and to each of his children $3,000; that he wanted to leave all his effects in the care of his father, the defendant, in whom he had perfect confidence. He died October 10, 1893, and on October 17, 1893, the defendant, in pursuance of the arrangement, took the bill of sale and delivered it to Wildner, receiving from him $6,000 and two judgment notes payable to Ida Rohn, under the name of Mrs. William Rohn, Jr., one for $1,000, due in two years, and the other for $1,500, due in three years. The $6,000 was raised by Wildner as above stated. The defendant gave to Ida Rohn, the widow, a list showing the two notes and other securities, aggregating $11,000, which was the entire estate left in his custody, as requested by the deceased. She then went with a friend and the defendant to an attorney's office, where she said that her husband was dead and it would be better to get things into proper shape in accordance with his will; that he wanted

her to have $5,000 and each of the children to have $3,000, and she wanted a document drawn up to have the transaction shown in case anything [187] should happen, and to show that defendant held the property. The attorney drew up, according to her directions, a declaration of trust, by which defendant acknowledged that he had received from his son, William Rohn, Jr., $11,000 in notes, partly secured and partly unsecured, which he held in trust for Ida Rohn and her two minor children, in the proportion of $5,000 for the former and $3,000 for each of the latter. He agreed to collect interest on all the securities and pay the same to Ida Rohn during the minority of the children; to turn over her share of $5,000 on demand, and $3,000 to each of the children when they became of age. This declaration was signed by the defendant. He attended to the collection of the principal and interest on the securities as they matured, without any compensation, under the agreement. The $1,000 note of Wildner was paid at maturity. Two annual payments of interest were made on the note of $1,500 and that note matured October 17, 1896, and was not paid when due. Defendant's brother, Rudolph Rohn, had furnished said sum of $2,000 when Wildner purchased the interest in the partnership, and the indebtedness had been increased to $3,000, for which Rudolph Rohn had taken a chattel mortgage on the property in the spring of 1896, and Wildner also owed Rudolph Rohn nearly two years' rent. In the latter part of October, 1896, the defendant and Rudolph Rohn went to Wildner, and defendant requested payment of the note to the estate. They both wanted Wildner to pay them, and he asked for time, showing them his stock and telling them he was looking for a partner and was able to pay everybody. He asked them to wait until after the election, in November, when he would get a partner or make a stock company and would see that they were protected. There was no agreement for any extension, but neither the defendant nor Rudolph Rohn took any steps to enforce collection. In November Wildner's mother, who had loaned him $2,000 to make the purchase, entered judgment on her note. [188] Rudolph Rohn, learning that fact, paid the judgment to her and foreclosed his chattel mortgage, leaving Wildner insolvent, and the $1,500 note could not be collected. Plaintiff was appointed administratrix of her husband's estate on January 26, 1897, and on August 13, 1897, she indorsed upon the declaration of trust a receipt for $9,500 in cash and all interest thereon to that date.

The defendant took charge of the property in entire good faith, without compensation, solely for the purpose of carrying out the wishes of his son. The only question of fact in controversy in the case was whether defendant was guilty of negligence is not entering judgment on the note and making an effort to enforce collection by that means.

The arguments of counsel on both sides are directed almost exclusively to the facts, but the judgment of the appellate court must be treated by us as finally settling the fact that the defendant was guilty of negligence in not exercising such diligence for the collection of the note as a man of ordinary prudence would have exercised in his own affairs, and also that the loss and damage to the estate was equal to the damages assessed.

The assignments of error which we may consider relate to the giving and refusing of instructions. There were only two instructions given at the request of plaintiff, and objection is made to them on the ground that they erroneously assumed that defendant, when the note became due, occupied the position of executor de son tort of his son's estate, while the evidence showed that he acted simply as a trustee for Ida Rohn and her two children, individually. What facts will constitute an executor de son tort of an estate is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury. In this case there was no controversy whatever as to the facts creating the relation of defendant to the estate. The defendant received all the property of the estate, consisting of $11,000 in [189] notes and securities, of which the widow was, under the statute, entitled to one-third and the children to the balance, in equal shares. The arrangement by which the contract with Wildner had been carried out was for the benefit of the estate and in the interest of the minor children, and has not been questioned by anybody. The defendant having taken the estate into his possession and assumed its management, was bound to hold and account for it in the proportions fixed by the statute. No doubt the widow and the defendant honestly believed that by reason of the expressed wish of the deceased his estate could be divided as they attempted to divide it, and that the property could be placed in the hands of the defendant in a trust relation, as requested by the deceased, but they were both bound to know the law, and that the deceased could not change the distribution of his estate under the statute without a will as he attempted to do. It is true that the declaration of

trust was made at the request of Ida Rohn, and that the services of defendant were performed in good faith, with no other motive than to carry out the wishes of his deceased son, but the arrangement was void in law. Ida Rohn was entitled, as widow, to one-third of the estate and the minor children each to one-third, and neither she nor defendant could increase her interest to $5,000. The parties were wrong in their supposition that the arrangement was binding upon the minor heirs, and the undisputed facts placed the defendant in the position of an executor de son tort of the estate. He was bound to exercise, so far as the estate was concerned, the same diligence in the collection of the note as if he had been a regularly appointed administrator, and there was no error in assuming that he occupied the same position and assumed the same responsibilities and liabilities as an administrator. The court refused instructions, asked by defendant, to the effect that acts of kindness, beneficence and charity do not amount to a usurpation of the office of administrator [190] and do not create a liability against any person. The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, as we understand it, are limited to such acts as directing a funeral, payment of funeral expenses and the preservation of the estate from loss or waste, and the like, while in this case the entire estate was taken by defendant for management and distribution, including everything, in substance, that an administrator would be bound to do, but different from the provisions of the statute. The court did not err in refusing the instructions referred to.

It is further urged that the court erred in refusing to give instructions, asked by the defendant, advising the jury that if the arrangement was concurred in by the plaintiff, and the defendant held the note, with the other property, for the use and benefit of the widow and heirs of William Rohn, Jr., with the knowledge and acquiescence of the plaintiff, she would be estopped from charging him as executor de son tort, and that he would have the right to apply the note to her distributive share of the estate, which exceeded the amount of the note. We think the court was right in refusing these instructions. In law the plaintiff represented the estate, suing as administratrix, and the only judgment at law would be for or against the defendant on the alleged liability to the estate. Counsel have pointed out no method by which a setoff or counterclaim could be interposed in a suit at law or any estoppel be made effective against the

plaintiff, representing the estate. A court of equity might look beyond the parties and determine the case upon their true relations and adjust the equities of all the parties. The minor children could not be required to bear any part of the loss, and in this suit the court could not apportion it. A court of equity may assume jurisdiction of the settlement of an estate, and in this case there was nothing to adjust except the interest of the distributees. If facts existed requiring that, as between the defendant [191] and the widow, the loss ought to be taken from her distributive share of the estate, it cannot be done in this suit, and such relief must be sought in a court of equity. Whether she, as an individual entitled to a distributive share of the estate, was in any manner responsible for his failure to collect the note is not a question in this case, and there was no error in refusing the instructions asked by defendant.

The judgment of the appellate court is affirmed.

EXECUTORS DE SON TORT.

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I. Office of Abolished in Many States.

The office of executor de son tort has been abolished in many of the states of the United States by express statute, while in some of the states, in the absence of any statute abolishing the office, it is

disregarded by the courts as being inconsistent with their system of administering the law. No such thing as an executor de son tort can exist in the following jurisdictions: Winfrey v. Clarke, 107 Ala. 355, 18 South. 141; Barasien v. Odum, 17 Ark. 122; Bowden v. Pierce, 73 Cal. 459, 14 Pac. 302, 15 Pac. 64; Fox v. Van Norman, 11 Kan. 214; Walworth v. Ballard, 12 La. Ann. 245; Gilkey v. Hamilton, 22 Mich. 282; Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432; Babcock v. Booth, 2 Hill, 181, 38 Am. Dec. 578; Metcalf v. Clark, 41 Barb. 45; Field v. Gibson, 20 Hun, 274; Dixon v. Cassell, 5 Ohio, 533; Rutherford v. Thompson, 14 Or. 236, 12 Pac. 382; Ansley v. Baker, 14 Tex. 607, 65 Am. Dec. 136; Hunt v. Butterworth, 21 Tex. 133, 73 Am. Dec. 223; Vela v. Guerra, 75 Tex. 595, 12 S. W. 1127; Roys v. Roys, 13 Vt. 543. Under the rule of these decisions and the probate system existing in the states proclaiming it, there can be no executor de son tort, as at common law, in so far as to authorize a creditor of the decedent to maintain an action against such executor and thereby appropriate the assets of the estate to the payment of such creditor's debt: Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432. A person who would be an executor de son tort under the common law is, under such system, liable only to the legal representative of the decedent for the property held by him wrongfully, and a creditor of the decedent is precluded from subjecting funds of the decedent in the hands of such person to the payment of his debt: Winfrey v. Clarke, 107 Ala. 355, 18 South. 141. Under the probate system generally existing, no one can make himself, of his own wrong, the executor of another; and if one intermeddles with the estate of a deceased person, he is responsible to the rightful executor or administrator only, and not to a creditor, as an executor de son tort. Barasien v. Odum, 17 Ark. 122. "In many of the states in which the statutes have attempted to place creditors upon an equality in the matter of payment, the courts have declared that there can be no such person as an executor de son tort in the sense of the English law": Fox v. Van Norman, 11 Kan. 217.

a. **Effect of Abolishing Office of.**—The common-law doctrines of executors de son tort are inconsistent with the general principles and policy of the statutes of most of the American states regulating the administration and settlement of the estates of deceased persons, which are usually to the effect that all of the assets of the estates shall be controlled exclusively by the personal representative and by him distributed among the creditors and legatees or distributees equally, in the order of their priority as fixed by statute. Hence, in some states, the courts, even in the absence of statute, refuse to recognize the office of executor in his own wrong. Other states, like California have abolished it by statute. This was the sole purpose of this or similar statutes. They abolish the office of executor of

his own wrong, if it can be called an office, and place such an intermeddler with the goods of a deceased person upon a level with any ordinary trespasser. The statute simply takes away the right of action which the creditor or legatee previously would have had against the trespasser, and vests it exclusively in the personal representative, so that the damages, when recovered, may be by him administered like any other assets of the estate. It was never designed to give to the personal representative a right of action for any acts for which, previously, neither he nor a creditor, nor a legatee could have maintained an action: Noon v. Finnegan, 29 Minn. 422, 13 N. W. 197. The enactment of a statute abolishing the office of executor de son tort takes "away the remedy the creditor before had to charge the intermeddler as an executor de son tort. He can no longer proceed against him in that character, but must procure the appointment of an administrator, and have suit instituted in his name, to recover the property from such person who has converted it to his own use. In a word, he is now sent to the rightful representative of the estate, and cannot pursue his action against an executor de son tort. The rightful executor or administrator is constituted the trustee of the assets of the deceased, whose duty it is to recover and hold them in his hands as a fund to be disposed of in the best manner for the benefit of the creditors. The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator. And, whether we consider the intermeddler as an executor de son tort or as a wrongdoer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice, as applied by the law in such cases. Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was for the benefit, and not injury, to the estate, as the payment of funeral expenses, or debts of the deceased, or charges such as the rightful executor or administrator might have been compelled to pay, he would not be allowed to show the same in mitigation of damages in an action of trover, instituted by such executor or administrator. In thus compelling him to account with only the rightful representative, the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor de son tort may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate": Rutherford v. Thompson, 14 Or. 240, 12 Pac. 382.

II. Definition.

An executor de son tort has been variously defined as being a person who, without authority from the deceased or the ordinary, does such acts as belong to the office of an executor or administrator. He is one who assumes to act as executor and settle up an estate without any authority. And in general he is liable only for the value of the assets which come into his hands: Fox v. Van Norman, 11 Kan. 217. "An executor de son tort was one who, being neither executor nor administrator, interferes with the goods of the deceased, or as defined by one author, one who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor for want of such constitution, substituted by the court to administer. Such an intermeddler was at common law held subject to all the liabilities of an executor, and estoppel by his own acts from denying that he was an executor in fact. At common law, when a person had so intermeddled with the personal estate of the deceased as to become an executor de son tort, he thereby became liable not only to an action by the rightful executor or administrator, but also to be sued by any creditor or legatee": Noon v. Finnegan, 29 Minn. 421, 13 N. W. 197. An executor de son tort is one who intermeddles with an estate of a decedent after his death, and does wrongfully such acts as a rightful executor might do: Mills v. Mills, 115 N. Y. 86, 21 N. E. 714. Such an executor is one who takes possession of the goods of a decedent without color of title: Johnston v. Duncan, 3 Litt. 163, 14 Am. Dec. 54. If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in law an executor in his own wrong, and thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee: Swift v. Martin, 19 Mo. App. 488.

III. What Acts Constitute One Executor de Son Tort.

Where the office of executor de son tort still exists there is no doubt that any intermeddling with the estate of a deceased person, such as collecting money, paying debts with the funds of the estate or making any other disposition of any part of the property, will make a person an executor in his own wrong; but the intermeddling must be such as to manifest a right to exercise a control, or make a disposition of the effects of the deceased: Givens v. Higgins, 4 McCord, 286, 17 Am. Dec. 742. A person thus intermeddling with the estate of a deceased, without any lawful authority, or by converting part of it to his own use, is liable as such executor: Brown v. Durbin, 5 J. J. Marsh. 170. Any intermeddling of this kind with the goods of an intestate by a stranger makes him thus liable: Glenn v. Smith,

2 Gill & J. 493, 20 Am. Dec. 452. Thus, any act which evinces a control over property of a deceased person, without legal right being shown, makes the person exercising it an executor in his own wrong as in favor of creditors: Mitchell v. Lunt, 4 Mass. 659; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 623. If there is neither will nor administration, the intermeddling of a stranger with the effects of the deceased, by taking them into his possession and treating or claiming them as his own, or appropriating them to his own use, will generally constitute him an executor in his own wrong: Bacon v. Parker, 12 Conn. 212. Or if he intermeddles with the estate of the deceased, and does acts which an administrator alone may do, he becomes an executor de son tort and liable as such: Bennett v. Ives, 30 Conn. 329. If anyone, though he is a legatee under the will, has taken possession of any of the property of the decedent without application for administration, he may be sued as an executor de son tort by an unpaid creditor: Wilson v. Davis, 37 Ind. 141. Slight acts of meddling with the goods of a deceased person will make one liable as such executor, and a sale of goods by him will so charge him: Wilson v. Hudson, 4 Harr. 168; Gentry v. Jones, 6 J. J. Marsh. 148. If one takes the goods of the deceased and sells or gives them to another, he is liable as such executor: Wiley v. Truett, 12 Ga. 588. If, at the request of the widow of an intestate, her father sells some of the property of the decedent, and turns the proceeds over to her, he thereby becomes an executor de son tort, if neither he nor the widow has administered upon the estate: Bryant v. Helton, 66 Ga. 477. One who makes a sale of the property of the decedent for and under the direction of the widow without administration, and invests the proceeds for her use, is liable as an executor in his own wrong: Leach v. Prebster, 35 Ind. 415. One who takes possession of a plantation at the owner's death, and markets the then growing crop, is liable for the proceeds thereof: Perkins v. Sturdivant (Miss.), 4 South. 555. The paying out of money for the expenses of a last sickness and funeral by a debtor of the estate who has received money of the estate, constitutes him an executor de son tort: Bennett v. Ives, 30 Conn. 329. And, generally, the payment of funeral expenses out of the effects of the deceased makes the person so meddling such an executor under the common-law rule: Shaw v. Hallihan, 46 Vt. 389, 14 Am. Rep. 628. The mere act of taking possession of the decedent's property and converting it may constitute the taker an executor in his own wrong, and subject him to the demands of the creditors of the estate: Currie v. Currie, 90 N. C. 553. If one converts notes belonging to a decedent's estate he becomes such executor, and cannot claim that such notes were assets and only collectible by a rightful executor to be appointed: Weaver v. Williams, 75 Miss. 945, 23 South. 649. A person to whom a will and a note due by himself, are intrusted by the testator, by the conceal-

ment of the will and the retention of the note after the death of the testator becomes an executor de son tort and liable to the legatees as such: Clarke v. Goodrum, 61 Miss. 731. A father who receives money as the avails of the estate of his deceased son, not showing any right to hold or control such money, may be charged by a creditor of the son as a wrongful executor: Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622. A person who lends himself to become the receiver of money belonging to, and found in the possession of an intestate, and wrongfully claimed by a third person as a gift and delivered to him, may be held liable as an executor in his own wrong: Scoville v. Post, 3 Edw. Ch. 203. The attorney of certain persons who hold a mortgage on the entire estate of a deceased person is liable as a wrongful executor for the excess of the property over the debt, where he has possessed himself of it, sold it, and distributed the proceeds: Ex parte Davega, 31 S. C. 413, 10 S. E. 72. One with whom money has been deposited, who after the depositor's death, pays the sum so received to the widow and creditors of the deceased is liable as an executor in his own wrong: Alexander v. Kelso, 1 Baxt. 5. Taking possession of assets and paying the debts of the deceased out of them will make the person thus acting an executor de son tort: Howell v. Smith, 2 McCord, 516. If a creditor of an intestate demands and receives his debts from the widow, out of the estate, knowing that administration has not been taken out, he may be held liable for the amount as an executor in his own wrong: Mitchell v. Kirk, 3 Sneed, 319. One who holds unlawfully the property of a decedent is liable as a wrongful executor although he may have originally taken possession of it by an agent in another state: Hopkins v. Towns, 4 B. Mon. 124, 39 Am. Dec. 497. If a decedent leaves a will with another, who files it and has it recorded, but does not take out letters of administration or other legal authority to administer, and takes possession of the estate, although there is an indebtedness by the deceased to him, he becomes an executor de son tort: Morrow v. Cloud, 77 Ga. 114. If a subagent continues to act after the death of the principal and notice from the agent that the agency is at an end, he becomes such an executor: Turner v. Child, 1 Dev. 25, 133, 331, 17 Am. Dec. 555. Heirs at law of a mortgagee by entering to foreclose after his death become executors in their own wrong: Haskins v. Hawkes, 108 Mass. 379. A person acting under void letters of administration becomes an administrator in his own wrong: Bradley v. Commonwealth, 31 Pa. St. 522. If a person having some authority to intermeddle with the goods of the deceased exceeds that authority, he may be charged as an executor de son tort: Wiley v. Truett, 12 Ga. 588. The earlier cases hold that if one takes possession of the goods of a deceased person, claiming to be executor, or does those acts which only an executor can do, he may be charged as executor de son tort, though there be a rightful executor or administrator: Howland v. Dews, R. M. Charlt. (Ga.)

383; Foster v. Nowland, 4 Mo. 18; Shaw v. Hallihan, 46 Vt. 389, 14 Am. Rep. 628. This doctrine is denied, however, in Bacon v. Parker, 12 Conn. 212.

IV. What Acts do not Constitute One Executor de Son Tort.

a. Acts of Charity or Kindness.—Many acts done by a stranger, which are ordinarily performed by a rightful executor, if they appear to be mere acts of kindness and charity, will not subject such stranger to an action by creditors of a decedent: Bacon v. Parker, 12 Conn. 212; Bennett v. Ives, 30 Conn. 329. A person does not become an executor de son tort by doing mere acts of kindness and charity touching the property of a deceased person, such as taking care of it, feeding stock, providing for children and the like; and to constitute him such there must be a wrongful intermeddling with the goods of the deceased: Brown v. Sullivan, 22 Ind. 359, 85 Am. Dec. 421. Acts of necessity or humanity by which a person does not assume to have any control over the property more than others do not constitute him an executor in his own wrong: Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622. One who as agent for the widow, in good faith, sells perishable property of the estate of her deceased husband and accounts for the proceeds, is not liable as an executor in his own wrong to the administrator subsequently appointed: Perkins v. Ladd, 114 Mass. 420, 19 Am. Rep. 374: Magner v. Ryan, 19 Mo. 196; Givens v. Higgins, 4 McCord, 286, 17 Am. Dec. 742. If one takes or retains possession of property of a decedent under color of title, and in good faith, believing his right to be superior to that of the lawful administrator subsequently appointed, he is not chargeable as an executor de son tort: Densler v. Edwards, 5 Ala. 31; Claussen v. Lafrenz, 4 G. Greene, 224; Smith v. Porter, 35 Me. 287; Turner v. Child, 1 Dev. 25, 17 Am. Dec. 555. One who takes possession of the property of the deceased without being entitled thereto, but in good faith, believing he has a legal right, is not to be held liable as an executor de son tort, if he has colorable ground for his claim, and good faith in its assertion: Baumgartner v. Haas, 68 Md. 32, 11 Atl. 588. If a person is lawfully in possession of and sells goods of a decedent under a bona fide claim of right, and without any intention to take upon himself the exercise of such duties as appertain to the office of a legal representative only, although he may not be able to make out a strict legal right, he is not liable to be charged as an executor in his own wrong: Willingham v. Rushing, 105 Ga. 72, 31 S. E. 130. And a widow who takes and claims as her own property held by her husband as bailiff, and who pays the debts of his estate out of her own money, does not hold such property as administratrix de son tort: Morris v. Lowe, 97 Tenn. 243, 36 S. W. 1098.

b. Acts Relating to Real Property.—As a general rule, no amount of intermeddling with the real estate of a deceased person will con-

stitute one an executor de son tort: King v. Lyman, 1 Root, 104; Ela v. Ela, 70 N. H. 163, 47 Atl. 414. Hence, if heirs intermeddle with the realty of their ancestor they do not thereby become such executor: Johnson v. Johnson, 80 Ga. 260, 5 S. E. 629. The heirs at law of the deceased may, as between themselves, divide the estate between themselves without becoming executors in their own wrong: Barron v. Burney, 38 Ga. 264; and an heir who, in a subordinate capacity, manages the property of his ancestor without administration is not liable in a character analogous to that of an executor de son tort: Valencia v. Bernal, 26 Cal. 328.

c. **Husband Retaining Possession of His Deceased Wife's Estate.** A husband who retains possession of his deceased wife's separate estate without administration cannot be held liable as an executor in his own wrong, but only to the exercise of the care required of a faithful agent: Blodgett v. Converse, 60 Vt. 410, 15 Atl. 109.

d. **Acts Done by One as Agent of Another.**—A person cannot be charged as executor in his own wrong by reason of acts done as the servant or agent of another. Hence, if one, at the request of a widow of a decedent, sells certain of his effects, and with the proceeds pays funeral expenses, and then tenders the widow the balance, he does not become liable as such executor: Magner v. Ryan, 19 Mo. 196. An act for which an agent is liable to the administrator does not make the former an executor de son tort: Turner v. Child, 1 Dev. 25, 17 Am. Dec. 555. If a person draws an order upon his agent, who is in possession of the property, and upon which the agent has a lien, and the order is accepted, and the drawer dies, the agent may sell the property to pay the debt without making himself liable as a wrongful executor: Debesse v. Napier, 1 McCord, 106, 10 Am. Dec. 658. If one, as the agent for a widow, receives the proceeds of the personal property of the estate of the deceased husband and after marrying such widow pays debts of the estate to the amount of almost twice as much as the sum thus received, he cannot be held liable as an executor de son tort: Winne v. Slaughter, 5 Heisk. 191. If an agent neither intermeddles with the affairs of the estate of his principal nor prevents the administrators from receiving the possession of notes which such agent has failed to collect, the latter is not liable as an executor de son tort: Darr v. Darr, 59 Iowa, 81, 12 N. W. 765.

e. **Purchasers from Executors de Son Tort.**—One who knowingly purchases from an executor de son tort is not chargeable as such himself: Smith v. Porter, 35 Me. 287. One who purchases personalty of a widow who remains in possession of her deceased husband's effects without administration cannot be held liable as executor in his own wrong: Johnson v. Gaither, Harp. (S. C.) 6. If a widow advertises her deceased husband's personalty for sale, and the purchaser knows that she has no letters of administration, neither of them are

liable as an executor de son tort, in a suit by a creditor who also has notice of the sale: Nesbit v. Taylor, Rice, 296.

f. **Intermeddlers After Letters Testamentary or of Administration have Issued** cannot, as a general rule, be sued by creditors as executors de son tort: Bacon v. Parker, 12 Conn. 212; State ex rel. St. Peter's Church v. Rogers, 1 Harr. 120; McMorine v. Storey, 3 Dev. & B. 87. One does not become such executor by receiving money from a savings bank under an order made by the deceased with the approval of an executor appointed in another state: Selleck v. Rusco, 46 Conn. 370. An administrator does not himself become an executor de son tort by taking possession of property found in the possession of his intestate, at his death, even though that property was in the possession of the intestate as the executor de son tort of another deceased person: Alfriend v. Daniel, 48 Ga. 154. One who administers upon the estate of a fraudulent assignee, and takes possession of the goods assigned, may, upon the death of the fraudulent assignor, be sued as an executor in his own wrong by the creditors of such assignor: McMorine v. Storey, 4 Dev. & B. 189, 34 Am. Dec. 374.

g. **An Intermeddler with the Assets of a Partnership,** after the death of one of the firm, is liable to account to the surviving partner, and therefore cannot be regarded as executor de son tort of the deceased partner: Hunt v. Drane, 32 Miss. 243. The fact that a trustee is indebted to his cestui que trust at the time of the death of the latter does not constitute the former an executor in his own wrong: Wilson v. Hall, 67 Ga. 53. A purchaser of property exempt from execution cannot be held liable on the death of the seller as a wrongful executor: Isler v. Haddock, 72 N. C. 115.

h. **An Assignee, Under a Void Deed of Assignment,** who accepts the trust, goes into possession of the goods conveyed, and sells them, some before and some after the assignor's death, and applies the proceeds to the debts mentioned in the assignment, all in good faith and without fraud, cannot be charged as an executor de son tort of the assignor: Chattanooga Stove Co. v. Adams, 81 Ga. 319, 6 S. E. 695.

V. Effect of Subsequent Administration by Executor de Son Tort.

It may be stated as a rule of universal application that a subsequent grant of letters of administration legalizes the acts of an executor de son tort. In other words, the subsequent granting of letters of administration relates back to the death of the intestate, and makes valid acts which otherwise would, or might have been, tortious; Moore v. Wright, 4 Ill. App. 443: Shillaber v. Wyman, 15 Mass. 322; Magner v. Ryan, 19 Mo. 196; Battoon v. Overacker, 8 Johns. 126. The grant of administration legalizes by relation, the

acts for which the administrator was chargeable as executor de son tort, and while he cannot avoid any act for which he was liable in that character, yet his rights as lawful administrator are not otherwise affected by his previous intermeddling: Witt v. Elmore, 2 Bail. 595. The executor may discharge himself from the strict liability of an executor in his own wrong, by taking out letters testamentary: Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622. For acts performed before his appointment as and for which, but for his appointment, he would be liable as an executor de son tort, he is liable only in the capacity of executor: McClure v. People, 19 Ill. App. 105. An executor in his own wrong who sells goods of the estate at a fair price before he is appointed administrator, may, after such appointment, maintain an action to recover the price from the purchaser: Hatch v. Proctor, 102 Mass. 351; Sellers v. Licht, 21 Pa. St. 98. If such an executor takes out letters testamentary, his responsibility relates back to the death of the testator, or to his first act of unauthorized interference: Farrell's Estate, Tuck. Surr. 110. If a person sued as executor de son tort takes out letters of administration pending the suit, this will not defeat the action, if it was well commenced: Rattoon v. Overacker, 8 Johns. 126. Nor can he in such case plead in abatement that he is administrator, and not such executor: Clements v. Swain, 2 N. H. 475. But if an executor in his own wrong has converted the property of the estate before obtaining letters of administration, his only liability is to account for it as administrator, or to pay the value thereof in a suit on his bond, but not to pay all of the debts of the estate because of such conversion by him: Lockhardt v. White, 18 Tex. 102. If a note has been paid by the widow of the deceased, and she afterward becomes administratrix with another, such payment may be pleaded in bar in an action against her as executor de son tort: Priest v. Watkins, 2 Hill, 225, 38 Am. Dec. 584. A grant of administration has relation to the death of the intestate, and legalizes the intermediate acts of the administrator, and a judgment against an executor de son tort is valid against him after he has regularly administered, and binds the estate, unless fraud or collusion is shown: Walker v. May, 2 Hill Eq. 22. If a judgment is obtained against an executor in his own wrong and he afterward takes out administration, but no assets remain in his hands for the payment of debts, it has been held that this constituted a good defense to an action of debt on the judgment: Olmsted v. Clark, 30 Conn. 108. A sale of goods as executor de son tort will not change the title to the goods, although he afterward regularly administers upon the estate: Wilson v. Hudson, 4 Harr. 168. The fact that an applicant for letters of administration has been an executor in his own wrong does not per se destroy his right of administration: Carnochan v. Abrahams, T. U. P. Charlt. 196.

VI. Transferees in Fraudulent Conveyances and Transfers Made by Decedent.

A person who takes, or has in his possession, property of the deceased, under a fraudulent conveyance from him, becomes thereby an executor de son tort, and liable to the creditors of the deceased as such: Densler v. Edwards, 5 Ala. 31; Tripe v. Ward, 2 Ga. 304; Hopkins v. Towns, 4 B. Mon. 124, 39 Am. Dec. 497; Dorsey v. Smithson, 6 Har. & J. 61; Garner v. Lyles, 35 Miss. 176; Osborne v. Moss, 7 Johns. 161, 5 Am. Dec. 252; Sturtivant v. Davis, 9 Ired. 365; Norfleet v. Riddick, 3 Dev. 221, 22 Am. Dec. 717; Tucker v. Williams, Dud. L. 329, 31 Am. Dec. 561. If possession of goods is taken by a vendee, after the death of the vendor under a deed fraudulent as to creditors, such vendee is liable to the creditors of the deceased vendor, as an executor de son tort, and this rule has been held to prevail even where the vendee takes possession shortly before the death of the vendor: Prentice v. Phillips, 1 Root, 103; Howland v. Dews, R. M. Charlt. 383. If one in his lifetime makes a fraudulent conveyence of his personal property, his grantee may, after his death, be charged as an executor in his own wrong, although there is a lawful administrator or representative: Simonton v. McLane, 25 Ala. 353; Babcock v. Booth, 2 Hill, 181, 38 Am. Dec. 578. As before shown, if one receives a fraudulent bill of sale of personalty from an intestate in his lifetime, and takes and sells it after his decease, such fraudulent purchaser is, to the amount of property thus taken, chargeable to a prior creditor as executor de son tort: Clayton v. Tucker, 20 Ga. 452; Allen v. Kimball, 15 Me. 116; Ellis v. McGee, 63 Miss. 168; Bailey v. Miller, 5 Ired. 444, 44 Am. Dec. 47. If a donee of goods takes them for the purpose of defrauding creditors, and the donor afterward dies, the donee may be charged as an executor in his own wrong by the creditors of the donor to the amount of the value of the goods thus taken: Gleaton v. Lewis, 24 Ga. 209; Stockton v. Wilson, 3 Penr. & W. 129; and defendant's mere averment that he took the goods in good faith will not relieve him from liability: Baumgartner v. Haas, 68 Md. 32, 11 Atl. 588. And a fraudulent donee who has become liable to creditors as an executor de son tort of his donor cannot discharge himself by delivery of the thing given to one who afterward obtains letters of administration: Morrison v. Smith, Busb. (N. C.) 399.

One who merely sets up a claim to goods of an intestate, under fraudulent conveyance, and thereby injures the sale of them, does not thereby render himself liable as an executor in his own wrong: Barnard v. Gregory, 3 Dev. 223.

A different rule prevails in regard to fraudulent conveyances of realty from that relating to conveyances of personalty. Thus a purchase of land by a child from his insolvent parent to defraud the creditors of the latter, the reduction of such land to possession

before the death of the parent, and the subsequent sale of it, does not fix him with the character of an executor de son tort: Johnson v. Johnson, 80 Ga. 260, 5 S. E. 629; Morrill v. Morrill, 13 Me. 415.

VII. Rights of Executor de Son Tort.

Such executor may use any lawful means to protect the assets of the estate: McIntire v. Carson, 2 Hawkes, 544. But one who intermeddles with the estate of a decedent without having been appointed administrator, has no absolute right to pay claims out of the assets of the estate, and can escape liability only by affirmatively showing that the amounts paid were correct: Crispin v. Winkleman, 57 Iowa, 523, 10 N. W. 919. An executor de son tort may, however, be justified in paying just debts of the deceased, and may plead plene administravit as against creditors, but cannot retain assets of the estate for a debt due himself: Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Kinard v. Young, 2 Rich. Eq. 247. The acts of an executor de son tort will be upheld, if they are such as a regular executor would be bound to do. Hence, he is entitled to retain out of the property of the estate the amount of just debts against it which he has paid: Dorsett v. Frith, 25 Ga. 537. Such an executor has no right to reduce assets of the estate, and he is, therefore, not chargeable for not reducing and administering them: Kinard v. Young, 2 Rich. Eq. 247. An executor de son tort is entitled to credit for debts paid by him on account of the estate, where there are sufficient assets to pay all the debts, otherwise in proportion to the amount of the assets as compared with the debts of the estate; Leach v. Prebster, 35 Ind. 415. Such an executor may protect himself as the rightful executor by a proper plea, and he is then answerable only to those who are entitled to the assets, and to the extent only as they have come into his hands: Stockton v. Wilson, 3 Penr. & W. 129. If one has received and used assets of an estate under circumstances constituting him an executor in his own wrong, he may exonerate himself by showing that he has applied such assets for the use and benefit of the estate's distributees, and that there are no debts: Brown v. Walter, 58 Ala. 310. Such an executor may discharge himself by proving debts to the amount of the goods received: Weeks v. Gibbs, 9 Mass. 77. Such an executor and those knowing his true character are bound by his acts and by their dealings with him: Caperton v. Ballard, 4 W. Va. 420.

a. **Setoff.**—One who administers an estate without authority may set off against the amount of assets which came into his hands the just debts of the decedent which were paid by him: Roggenkamp v. Roggenkamp, 68 Fed. 605. A person sued as an administrator de son tort, to recover the value of the assets of an estate, which he has converted to his own use, or disposed of, is entitled to be allowed in reduction of damages, the amount of such assets applied by him to the proper uses of the estate, in the payment of its debts or other-

wise: Reagon v. Long, 21 Ind. 264. Charges paid by such an executor cannot be availed of as a setoff against a claim of the estate when unsupported by evidence showing that they were legal demands against it: Weaver v. Williams, 75 Miss. 945, 23 South. 649. Debts against an estate voluntarily paid by an executor de son tort cannot be set off by him in an action by a distributee of the estate for his share of the property: Bryant v. Helton, 66 Ga. 477. But in such case the executor who has sold property of the estate and turned the proceeds over to the widow may set off the year's support of the family: Bryant v. Helton, 66 Ga. 477. It has been held, but we think without good reason, that in trover by the rightful executor to recover the value of goods and effects of the estate taken by an executor de son tort, the latter cannot file an account in setoff for the testator's debts, paid by him since the decease: Tobey v. Miller, 54 Me. 480.

VIII. Liability of Executor de Son Tort.

In connection with the liability of an executor in his own wrong, it may be first remarked that the same rules, with regard to the payment of debts which apply to a rightful executor, apply to him also: Bennett v. Ives, 30 Conn. 329. And an executor de son tort, to discharge himself, must show that he has applied assets in his hands as they could have been lawfully applied by the rightful executor: Gay v. Lemle, 32 Miss. 310. Such executor, like a rightful executor, is liable in all cases, so far as he has assets of the estate, for all the debts due by the deceased: Brown v. Durbin, 5 J. J. Marsh. 170. Such executor is personally liable to a creditor of the deceased to the extent of the property received by him: McKenzie v. Pendleton, 1 Bush, 164. He is liable to be sued by any creditor of the estate to the value of the property taken or received by him, and all damage caused by his acts: Elder v. Little, 15 Iowa, 65. He is generally liable only to the extent of the assets which came into his hands, and he may show in discharge of his liability that he has paid them away in due course of administration, though he cannot retain them for his own debt: Hill v. Henderson, 13 Smedes & M. 688; Cook v. Sanders, 15 Rich. 63, 94 Am. Dec. 139. He cannot, in any case, retain assets for his own debt as against other creditors of the estate: Kinard v. Young, 2 Rich. Eq. 247; Partee v. Caughran, 9 Yerg. 460; and he is required to pay such assets to the other creditors, although there is nothing left with which to pay his own claim: Bumgartner v. Haas, 68 Md. 32, 11 Atl. 588. One who takes possession of an estate without legal authority may be held to account for it, or its value: Stephens v. Atkins (La.), 34 South. 108. An executor in his own wrong is liable to account to the duly appointed executor or administrator: Swift v. Martin, 19 Mo. App. 488; Muir v. Trustees, 3 Barb. Ch. 477. Or to the distributees or legatees of the deceased, the same as a rightful executor: Hansford v. Elliott, 9

Leigh, 79; Swift v. Martin, 19 Mo. App. 488; and in such case he cannot show in mitigation of damages payment of debts to the value of goods still in his possession, nor will he be permitted to retain them in satisfaction of his own debt: Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152. If, when sued, he pleads ne unques executor, and such issue is found against him, he is liable for the debt de bonis propriis, the same as any other executor: Campbell v. Tousey, 7 Cow. 63. And his estate after his death is liable for the damages sustained by his wrong: Swift v. Martin, 19 Mo. App. 488.

A person to whose order money belonging to an estate was paid before an administrator was appointed is accountable therefor, to the rightful administrator, although the money or the avails of it never came to his actual use, but was kept by his agent: Clark v. Pishon, 31 Me. 504. If a person appointed as executor has received rent of land devised to be sold, but refuses the appointment of executor, he is liable to the administrator with the will annexed, in an action to recover such rent: Steele v. Steele, 4 J. J. Marsh. 232. A son of a decedent who carries on the estate and pays a large portion of the decedent's debts without taking out letters of administration, is liable for rent for the interest of the heirs who do not live on the estate: Risk v. Risk, 10 Ky. Law Rep. 566, 9 S. W. 712. If one, on the death of an intestate, takes possession of his cash on hand with a view to its safekeeping, an action for money had and received may be maintained against him by the rightful administrator, and it makes no difference that the latter was present and made no objection when the money was taken: Sebring v. Keith, 2 Hill, 340. If an attorney at law or other person acting as agent for another, known to him to be without authority or right, takes possession of the personalty of a deceased person and converts it into money without administration, he is liable to the lawful administrator for the value of the property converted, without reference to whether he accounts to the person for whom he acts or not: Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107. One who takes a note prior to the death of the owner and holds it afterward as executor de son tort, neglecting to collect it until the maker becomes insolvent, is liable to the lawful administrator for the whole amount of the note if it was good and collectible at the time of the owner's death. But he is liable only for the delivery of the note, if it was worthless at the time of the owner's death: Root v. Geiger, 97 Mass. 178. It has been held that if a creditor becomes an executor in his own wrong of his debtor, the value of the latter's estate taken into such creditor's hands may be regarded as a payment pro tanto of the debt: Finnell v. Meaux, 3 Bush, 449. This holding is, of course, contrary to the weight of authority that an executor in his own wrong cannot retain assets of the deceased with which to pay his own debt. Persons who have presumed without lawful authority to administer an estate, and who claim to have fully administered it, are estopped,

in a proceeding for an accounting, from denying their representative character or their liability to account: Damouth v. Klock, 29 Mich. 289.

IX. Widow as Executrix de Son Tort.

a. When Liable.—If a widow continues in the possession of her deceased husband's goods, and treats them as her own, without administration, she is liable as an executrix de son tort: Hawkins v. Johnson, 4 Blackf. 21. If she seizes upon her part of her husband's estate before the matter has been passed upon by the probate court, she may be charged for it as an executrix in her own wrong: Schaffner v. Grutzmacher, 6 Iowa, 137. If she and the heirs have appropriated all of the assets of the estate, prior to the appointment of an administrator, they are liable therefor, as administrators in their own wrong: Madison v. Shockley, 41 Iowa, 451. If a husband, by his last will, devises all his estate, both real and personal, to his widow, and she, without probating the will and without administration of the estate, takes possession of and converts all of it to her own use, she is liable therefor as an executrix de son tort: McCoy v. Payne, 68 Ind. 327; Truett Sons v. Cummons, 6 Ill. App. 73; Wilbourne v. Wilbourne, 48 Miss. 38. If a widow receives insurance money on her deceased husband's share in a vessel, no administration having been taken out on his estate, she may be held liable as an executrix de son tort as to a creditor of her husband: White v. Mann, 26 Me. 361. She may thus be held liable if she takes possession of the slaves of her deceased husband and disposes of them before administration of his estate is taken out, and before her distributive share has been set apart to her: Brown v. Bibb, 2 Cold. 434. She is thus accountable for the value of personal property belonging to her husband, sold by her on the day of his death, without authority from him: Walton v. Hall, 66 Vt. 455, 29 Atl. 803. A widow, by taking possession of and using a horse belonging to her deceased husband, and negligently permitting such horse to become lost, constitutes herself his executrix de son tort: Hubble v. Fogartie, 3 Rich. 413, 45 Am. Dec. 775. A widow, as such executrix, is liable to her deceased husband's creditor for such part of his estate as she has appropriated, in case such estate proves insolvent: Wilbourne v. Wilbourne, 48 Miss. 38. A testator's widow who qualifies under a revoked will as testatrix and executrix may be charged with the appraised value of the testator's household goods and chattels, at the suit of his personal representative: Spruance v. Darlington, 7 Del. Ch. 111, 30 Atl. 663. If a widow meddles with the estate of her deceased husband without taking out administration, she is chargeable with the highest legal rate of interest on the amount for which she is accountable: Walton v. Hall, 66 Vt. 455, 29 Atl. 803. But in such case the value of her year's provision is to be deducted from the assets found to be on hand: Israel v. King, 69 N. C. 373. And on being compelled to account for rents received

by her since her husband's death, she will be allowed for taxes, repairs, etc., paid out on encumbrances: McMonigle v. McMonigle, 42 N. J. Eq. 64, 6 Atl. 314. If a widow becomes liable as executrix de son tort of her husband, and afterward marries, both she and her husband are liable as such executor and executrix: Hubble v. Fogartie, 3 Rich. 413, 45 Am. Dec. 775. A widow as such executrix cannot take credit for that which under a regular administration would be her own: Schaffner v. Grutzmacher, 6 Iowa, 137.

b. When not Liable.—A widow does not render herself liable as executrix de son tort by continuing to reside where the family lived at the time of her husband's death, nor by merely taking care of the property of the estate until an executor is appointed: Ward v. Bevill, 10 Ala. 197, 44 Am. Dec. 478. The mere fact that a widow has possession of some of her deceased husband's goods, without administration, but without exercising any right of ownership over them, does not render her personally liable for a debt due from the estate: Chandler v. Davidson, 6 Blackf. 367. If a widow, without administration, sells personalty of her deceased husband, and with the money pays preferred claims against his estate, she is not personally liable in a further amount to another creditor of her deceased husband: Bogue v. Watrous, 59 Conn. 247, 22 Atl. 31. A widow who takes possession of property bailed to her husband, since deceased, and claims it as her own, and pays his debts out of her own property, is not an executrix de son tort: Morris v. Lowe, 97 Tenn. 243, 36 S. W. 243. An executrix of a deceased debtor is not liable to the creditors of her husband as an executrix de son tort, when it appears that her husband had departed from the state upon a trading voyage and died abroad, leaving her with a family to support, and that before hearing of his death, she used the property left by him in the support of the family and payment of his debts: Brown v. Benight, 3 Blackf. 39, 23 Am. Dec. 373. If, after an intestate living in one state had died, but before his wife, acting as his agent in another state, heard of his death, she had received money due him acting as agent to collect debts for him for her support, and had used the money for the purpose authorized, she is not liable therefor to the creditors of the deceased as executrix in her own wrong: Ginochio v. Porcella, 3 Brad. Surr. 277. A widow who claims and takes personalty of her deceased husband exempt from execution is not liable to a creditor as executrix in her own wrong: Frierson v. Wesberry, 11 Rich. 353. By giving away a suit of clothes of her deceased husband, a widow does not make herself liable to his creditor, especially when she has paid from her own means his debts of greater value than the clothes: Taylor v. Moore, 47 Conn. 278.

BURNETT v. PEOPLE.

[204 Ill. 208, 68 N. E. 505.]

CRIMINAL LAW—Act of Principal when Act of Accessory.—The act of the principal when done pursuant to the will and direction of the accessory, is the act of the latter, and he is liable as a principal. (p. 216.)

MURDER.—The Survivor of an Attempted Double Suicide is not guilty of murder, unless the evidence shows, beyond a reasonable doubt, that he did or said something which aided, encouraged, or induced the deceased to kill herself. (p. 217.)

CRIMINAL LAW—Evidence.—The jury must be instructed to receive with caution verbal admissions of the accused made in response to questions at a time when his mental and physical condition is doubtful as a result of the use of drugs. (p. 217.)

CONFESSIONS AS EVIDENCE.—If the confession of an accused is introduced in evidence, those parts thereof which are in his favor are entitled to as much consideration as those which are against him, if they are not disproved, and are not improbable or untrue, when considered in connection with all of the other testimony in the case. (p. 218.)

MURDER—Suicide—Evidence of Chastity.—The admission of evidence of the general good reputation of the deceased for chastity is prejudicial error against a person accused of inducing her to commit suicide, when such chastity is not in issue, and is not attacked, except by showing a liaison between the deceased and the accused. (p. 220.)

O'Donnell & Brady and W. Dillon, for the appellant.

H. J. Hamlin, attorney general, C. S. Deneen, state's attorney, J. R. Newcomer and F. L. Barnett, for the people.

210 RICKS, J. The evidence discloses that the plaintiff in error, Orville S. Burnett, whom we will refer to hereafter as defendant, a married man about twenty-eight years of age, living with his wife, was a practicing dentist, with an office in the city of Chicago; that he had resided there some two or three years, and that his family relation was pleasant. The deceased, Charlotte S. Nichol, was a married woman living with her husband and three children, residing about three blocks distant from defendant's residence and place of business. About the 3d of September, 1901, defendant became acquainted with the deceased, Mrs. Nichol, in a drugstore under his office. At that time Mrs. Nichol was with a woman called Kirby Smith, from some place in Tennessee. The defendant and the two women casually met in this store, and, without anybody to introduce them, formed an acquaintance. Between that time

and the 20th of October—the date of the death of Mrs. Nichol and of the alleged crime of the defendant—the defendant and Mrs. Nichol were very frequently together, sometimes accompanied by Kirby Smith, on which occasions they went to theaters, saloons, [211] luncheons and dinners and at other times visiting the house of Mrs. Nichol, accompanied by a man named Adams, and one time, at least, upon the invitation of the husband of Mrs. Nichol, visited the home of the latter and took dinner there. The evidence shows that on the night of Wednesday, the 17th of October, the defendant and Mrs. Nichol spent the night together at the Marlborough Hotel. The husband of Mrs. Nichol was holding some official position with a railroad company and had formerly lived in Tennessee. Shortly prior to Mrs. Nichol's death her husband had been promoted to a higher position with the railroad company, which necessitated his return to Nashville to reside. This change of residence was very distasteful to Mrs. Nichol, as it appeared that her home life in Tennessee, where she had formerly resided with relatives of her husband, had been made unpleasant, and also for the further reason that during her brief acquaintance with defendant she had formed a violent attachment for him and was very loath to leave him. When Mrs. Nichol was apprised that it was necessary for her to change her residence, it seems that the idea of suicide at once entered her mind, and on the Wednesday evening preceding her death, being the same day she learned of the proposed change, she sought the defendant, went to saloons with him, drank with him, spent the night at the Marlborough, as above stated, and during that night constantly talked about committing suicide, stating that she had sufficient chloral to accomplish that end. The defendant advised her against pursuing this course, pointing out to her the absurdity of doing so. The following Saturday evening—the night of her death—defendant again met her about 6 o'clock, and from that time until 1 or 2 o'clock the following morning, in the company of each other, they were in a number of saloons, each drinking quite heavily and each taking whisky. During the evening Mrs. Nichol was continually talking about committing suicide, stating [212] that she would not go back to Nashville under any circumstances, and informed the defendant that she had determined to commit suicide, stating she had in her pocket-book two phials of morphine, and solicited the defendant a number of times to commit suicide with her, which he refused to do. About 2 o'clock

on Saturday morning they arrived at the Marlborough Hotel, where they secured a room together for the night. When they arrived there, defendant, Burnett, was quite drunk, but Mrs. Nichol did not seem to be drunk but in the possession of her senses. A short time after entering the room Burnett went across the street to a drugstore and purchased a phial of morphine containing twenty-five quarter-grain tablets, which he brought to the room, opened and set upon the dresser, and at which time he states there were two similar phials standing upon the same dresser. When he returned the deceased was undressed, being simply in a night-robe, and lying on the bed and seemingly very happy. She requested some paper and an envelope, which defendant rang for and which were brought. The sheet of paper and envelope were delivered to Mrs Nichol as she lay in bed, in the presence of the maid who brought them. Mrs. Nichol at once began writing upon the paper handed to her. When defendant opened the phial of morphine purchased by himself, it overturned, and a portion of its contents—about half—spilled on the floor. Defendant then undressed and retired, and went to sleep without taking any of the morphine. Some time the next day, when he awoke, he found that Mrs. Nichol was lying by his side dead, and found a note written by her upon the dresser and over or against the empty morphine bottles, which was as follows:

"To whom it may concern: I did it because I loved him better than anything on earth, and he loved me, and we could not be separated. Good-by. CHARLOTTE."

Upon discovering the death of Mrs. Nichol, defendant, horror-stricken at the situation in which he found [213] himself and believing that his life was ruined, arose, took the morphine remaining in the bottle purchased by himself, attempted to cut his throat or puncture his neck with a hat-pin, and turned on the gas and lay down. The proprietress of the house, detecting the gas, came to the door and was admitted by defendant. A doctor and the police were called at once. Restoratives were given to defendant, and about three hours later he was taken to the police station, where a statement was taken from him.

The statements of the defendant, Burnett, are substantially the only evidence in the case in any manner connecting him with the death of Mrs. Nichol. These statements began when the doctor arrived, and were concluded (there being several of them) about 10 o'clock at night, in the police station. The

portions of the statements or admissions chiefly relied on for conviction were to the effect that he had agreed with the deceased to commit suicide if she did. No witness heard any of the conversation between the parties. No witness saw anything done by either of them calculated to produce the death of the deceased, and outside of the statements of Dr. Burnett, the defendant, the only evidence was the fact of their being together in the place, the note found and the three empty morphine phials, and the testimony of the druggist that a man somewhat resembling the defendant purchased a phial of morphine during that night.

The first person to see the defendant, outside of the chambermaid and the landlady, who had no conversation with him and knew nothing about him outside of the fact that he was drunk when he came in the night before and that the paper was called for and given to the deceased, was Dr. Carter, a witness for the people, who arrived there at 3:30 P. M., and testifies that when he first saw defendant he was in a sort of dazed or stupefied condition, with the pupil slightly contracted, but that at that time the witness could not tell whether the defendant was suffering from the effect of the excessive use of [214] liquor or the effect of morphine. To the doctor, upon his inquiry, the defendant stated that he and the woman had taken a room together there, and that sooner than go south with her family she had taken the suicide route, and called the doctor's attention to the note which one of the maids of the hotel had found. When asked as to the cause of death the defendant pointed to the dresser, where three empty morphine phials were, and stated that she had taken a quantity of morphine; that the defendant awoke some time during the afternoon and also attempted to commit suicide, calling attention to the scratch on his neck made by the hat-pin, and stated that he had taken morphine and turned on the gas, and requested the witness to give him more morphine that he might finish his undertaking. To the doctor he said nothing about any agreement between him and the deceased to commit suicide. The doctor stated that at the first visit he stayed but a short time and returned in an hour, and found the pupil contracted and the patient in a semi-comatose condition. He stated that the effect of morphine was first promotive of mind exhilaration, and secondarily resulting in stupor, and finally in death, unless checked. He stated also that he administered an emetic to the patient and tortured him to keep him awake,

and directed the officer to use his club on the bottom of the defendant's feet, as that was the best treatment to keep one from relapsing into sleep in case of morphine poison; that the primary effect of morphine lasted about four hours and the after-effect several hours, the exact time not stated; that he saw the defendant at 6 o'clock the last time, and that defendant was then tending toward stupor; that when he first talked to the defendant he was apparently rational, but any stimulant would give that impression at first; that the stimulus to the mind is the first effect, but in an hour, when witness became satisfied that defendant's condition was due to morphine, he regarded him as not responsible for what he was saying.

215 Officer O'Brien seems to have been the next person in the order of those to see defendant. He stated that he arrived at the Marlborough about 4 o'clock, and that defendant was still lying in bed, opposite the body of Mrs. Nichol, and was not yet dressed, and that he stayed until 6 o'clock and assisted in taking him to the station; that defendant pointed out to him, while there, the drugstore where he got the morphine, and that defendant also said that he and deceased agreed to commit suicide together before they came to the hotel that evening. This witness also testified that the defendant told him he tried to kill himself with his knife. The officer took the knife and it was introduced in evidence. To this officer nothing was said about the hat-pin. Describing the condition of the defendant and how he talked with him, the officer said that he was directed by the doctor to keep the defendant awake; that he put water on him, rubbed a big piece of ice steadily up and down his back for half an hour, pinched and slapped him, shook him, pulled his ears and did everything he could to keep him awake, and that the statements made by the defendant were in answer to questions put by him.

Officer White, who assisted O'Brien in taking the defendant to the station, testified that he arrived at the Marlborough about 5 o'clock, and that officer O'Brien was trying to put the defendant's clothes on him when he arrived; that the defendant could not get up—could not handle himself; that they had to dress him, and that the defendant made no statement while he was there; that they all tried to keep him awake, and that it took a full hour to dress him.

When the defendant was taken to the police station, officer Shaughnessy, connected with that station, was directed to take defendant's statement, which he says he did, in writing. The

written statement was not offered in evidence. Sidney M. Weil, a newspaper reporter, was present at the taking of that statement, and both were [216] witnesses at the trial. While assisting with that statement, the defendant said that the deceased stated that she could not live in Nashville and could not bear to leave the defendant, and that she was going to commit suicide, and asked him to commit suicide with her; that at first he did not like the idea, but finally assented; that she told him that she had enough morphine for herself but not enough for two, and that he went out and got a bottle of morphine and came in and set it on the dresser. In this statement the defendant detailed the trip of the deceased and himself the night of and preceding the tragedy, and as much as he knew relative to it. The testimony of the witness Weil in regard to it covers some four or five pages, and the witness states that they were a full hour getting the statement; that the defendant was lying in bed when he and the officer went in to see him, and apparently asleep; that they aroused him and told him that they desired to take his statement; that it was necessary to shake him and wake him up or arouse him, and that they did shake him several times during this conversation; that both Shaughnessy and the witness would shake him and then ask him more questions, and that after getting the thread of the story the defendant would doze off, his eyes would close, he would breathe heavily and the lids of his eyes would flutter; that it would take a second or two to arouse him at each time; that he was under a heavy drug of some kind; that the defendant volunteered nothing himself; that it was all solicited from him by questions, and he only made statements as questions were asked him, except in one or two instances. As to the condition of the defendant at that time both Weil and Shaughnessy agree, Shaughnessy stating that the defendant had to be aroused every fifteen or twenty seconds and seemed to be dazed and stupefied.

The next witness who testified was Charles F. Carpenter, who took a statement from the defendant about [217] 10 o'clock at night, when he was in his cell. This witness testifies that defendant was not asked by him the direct question whether he did agree with deceased to commit suicide, but he (witness) told him that the officers of the station were so reporting, and he asked him what about it, when the defendant said: "I suppose I said it; I was drunk; I suppose I agreed; I suppose it was true." As to the condition of the defendant at that time

this witness says: "When I began talking to him he did not talk very freely; he seemed to be in a kind of stupor; he was all humped up in a chair and did not seem to pay any attention to surroundings; I put the questions to him and he would answer yes or no; did not go ahead and tell the story; he would affirm or deny a story; he never contradicted me in any of them; he seemed to assent to whatever I said; no difference what I said, he seemed to agree with me; I would make suggestions and he would assent; that is practically it."

There is no evidence, either by the admissions of the defendant or any witness, that the deceased took any morphine in the presence of the defendant, or that he gave her any, or requested her to take any, or bought any for her. The evidence rather tends to show that while the defendant was gone to the drug-store to get the morphine that he purchased, the deceased took that which she had. In one of the alleged confessions or admissions the defendant said, "I drank considerable, and she had worked me up to such a state that I agreed to do anything with her." The defendant testified in his own behalf and denied explicitly that he ever stated to Mrs. Nichol that he would kill himself if she did, but, on the contrary, he urged and counseled her against suicide; that the deceased insisted that she would commit suicide and had sufficient morphine in her pocket-book to accomplish that end, and further stated that she would never return to Nashville. Defendant denied that he saw her take any morphine or advised her to take any, and [218] stated that he had no recollection whatever of being at the police station or making any statements or confessions or admissions that were offered in evidence against him, but did admit that he bought the morphine, but was unable to state why he did it. He swore that he took none of it until after he had discovered that Mrs. Nichol was dead, and then not in pursuance of an agreement, but because of his disgrace and humiliation.

The conviction of the defendant for murder in this case can only be sustained on the hypothesis that there was an agreement between him and Mrs. Nichol to commit suicide together, and that that agreement, in part, at least, was the inducing cause of the deceased taking the poison that produced her death. Upon the question whether, under the circumstances, suicide is a crime, we have a paucity of decisions. The general rule as stated by Wharton is: "If two persons encourage each other to commit suicide jointly, and one succeeds and the

other fails in the attempt upon himself, he is a principal in the murder of the other": Wharton on Criminal Law, sec. 448. There are a number of English cases that hold if two persons mutually agree to commit suicide and the means employed produce death upon one of the persons only, that the one surviving will be guilty of murder; but in all such cases the defendant was actually present and did some act furthering the commission of the suicide. Thus, in Regina v. Jessop, 10 Crim. Law. Mag. 862, Jessop handed the bottle of laudanum to the deceased with the intention that the deceased should drink therefrom a sufficient quantity to cause death. In Regina v. Stormouth (Q. B. Div.), 61 J. P. 729, there was an agreement to commit suicide between a man and a woman because of poverty. The agreement was mutual, and each purchased laudanum to carry out the agreement. The woman took the laudanum and died. The man took a portion but did not die, and left a note in the room where they both had been, stating that they had made such an agreement, and that [219] the laudanum taken by the woman had produced death but his had not proved fatal, so that other means must be resorted to. On the same day of the discovery of the death of the woman the man was arrested. In discussing the case the court said: "If there was an agreement, in consequence of which the woman destroyed herself, the prisoner was guilty, in the law, of murder; and the fact that that might have been only a pretended agreement on his part, or that he might have had some idea of not carrying out his part of the agreement, or have changed his mind, made no difference in law."

In this state we have never had the question before us, and there are few cases decided by other courts of this country. In Blackburn v. State, 23 Ohio St. 146, Blackburn and a woman named Lovell mutually agreed to commit suicide. The defendant mixed strychnine with wine, and in pursuance of the agreement the woman drank the mixture. There was some evidence tending to show that the defendant, by threats, forced the woman to take the poison. The defendant was found guilty and appealed, contending that as suicide was not punishable there could be no conviction as an accessory. To this contention the court said: "Purposely and maliciously to kill a human being by administering to him or her poison is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered, or the manner in which or the means by which it is admin-

istered. The fact that the guilty party intends also to take his own life, and that the administration of the poison is in pursuance of an agreement that both will commit suicide, does not, in a legal sense, vary the case. If the prisoner furnished the poison to the deceased for the purpose and with the intent that she should with it commit suicide, and she accordingly took and used it for that purpose, or if he did not furnish the poison but was present at the taking thereof by the deceased, participating, by persuasion, force, threats or otherwise in the [220] taking thereof or the introduction of it into her stomach or body, then, in either of the cases supposed, he administered the poison to her, within the meaning of the statute. Her act of taking and swallowing it in his presence and by his direction was his act of administering it. It is said by counsel that suicide is no crime by the laws of Ohio, and that therefore there can be no accessories or principals in the second degree in suicide. This is true; but the real criminal act charged here is not suicide, but the administering of poison, and to this criminal act there may be accessories and principals in the second degree. If I furnish poison to a guilty agent—an accomplice—to be administered by him, and he administers it accordingly, I am accessory before the fact; and if I stand by and counsel or encourage him in the act of administering the poison to another I am a principal in the second degree. But no question of this kind arises in the present case, either upon the indictment or in the evidence. There is no claim or pretense that there was any guilty third person participating in the transaction. The charge is, that the prisoner, as principal in the first degree, is guilty of administering poison and thereby causing death. We think, therefore, that the court did not err in its instructions as to what amounted to the administering of poison within the meaning of the crimes act."

In Commonwealth v. Bowen, 13 Mass. 356, 7 Am. Dec. 154, one Jewett was imprisoned under sentence of death, and the defendant, Bowen, having an opportunity to talk with him, advised him to commit suicide, and procured and brought to him for that purpose a rope, with which Jewett did hang himself. The defendant was indicted for murder, there being two counts. The first count charged that the defendant "did counsel, hire, persuade and procure said Jewett" to kill himself. The second count charged, directly, that Bowen murdered Jewett by hanging. This seems to be the first and leading reported case in any of the states upon this question. Upon

appeal the court [221] said: "You have heard it said, gentlemen, that, admitting the facts alleged in the indictment, still they do not amount to murder, for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That the act of Bowen was innocent no one will pretend; but is his offense embraced by the technical definition of a principal in murder? Self-destruction is doubtless a crime of awful turpitude. It is considered in the eye of the law of equal heinousness with the murder of one by another. In this offense, it is true, the actual murderer escaped punishment, for the very commission of the crime, which the law would otherwise punish with the utmost vigor, puts the offender beyond the reach of its infliction, and in this he is distinguished from other murderers. But his punishment is as severe as the nature of the case will admit. His body is buried in infamy, and in England his property is forfeited to the king. Now, if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A by B, and I apprehend that if a man murders himself, and one stands by aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A murders B; and if one becomes the procuring cause of death, though absent, he is accessory."

The only other reported case that we know of is that of Commonwealth v. Mink, 123 Mass. 429, 25 Am. Rep. 109. In that case the defendant was engaged to be married to one Charles Ricker, who expressed his intention of breaking the engagement. This announcement so exasperated the defendant that she determined to take her own life, and, seizing a revolver, made an attempt to shoot herself. Ricker being present, seized her and attempted to prevent her carrying out her purpose, and in the struggle the pistol was accidentally discharged, fatally wounding Ricker. The defendant was indicted and convicted of manslaughter. The court held that suicide was a [222] criminal act, and followed the principle that if one attempts to commit a criminal act and thereby commits homicide, although no homicide was intended, the crime will be manslaughter. It was also held that in that state suicide was not technically a felony, and the conviction was sustained.

We are not disposed to go to the extent of holding, as was done in Commonwealth v. Bowen, 13 Mass. 356, 7 Am. Dec. 154, that suicide or self-destruction is a felony, but take the view that the later pronouncement of the Massachusetts court

in Commonwealth v. Mink, 123 Mass. 429, 25 Am. Rep. 109, and of the Ohio court in Blackburn v. State, 23 Ohio St. 146, more nearly announce the correct rule. By the English common law suicide was a felony, and the punishment for him who committed it was interment in the highway with a stake driven through the body, and the forfeiture of his lands, goods and chattels to the king. We adopted the English common law, and the acts of the British parliament in aid thereof, as it existed up to the fourth year of James I, which was the year 1606, as far as the same was applicable to our conditions and institutions and of a general nature; but as we have never had a forfeiture of goods or seen fit to define what character of burial our citizens shall enjoy, we have never regarded the English law as to suicide as applicable to the spirit of our institutions. In the view we entertain of the case at bar it is not necessary that suicide be held to be a crime. The charge against the plaintiff in error in both counts in the indictment is murder. In the first count he is charged with murdering Charlotte S. Nichol by administering poison to her, and in the second count with murdering her by hiring, persuading and procuring her to take poison, and we think proof of either one of these charges would warrant the conviction for murder.

The English common law, as applied to accessories before and at the fact, has become more a form than a substance under our law. From an early day we held that under our statute the accessory before and at the [223] fact could be indicted as a principal: Baxter v. People, 3 Gilm. 368; and in two cases where the question was directly presented, we held that it was improper to indict an accessory simply as such, as was done at common law, but that he must be indicted as principal: Usselton v. People, 149 Ill. 612, 36 N. E. 952; Fixmer v. People, 153 Ill. 123, 38 N. E. 667. As to the crime of murder, we have applied the rule that he who acts by another acts by himself, and that the acts of the principal are the acts of the accessory, and that the latter may be charged with having done the acts himself, and may be indicted and punished acordingly: Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898. If a lunatic or an idiot, at the instigation or direction of another person should commit a homicide, none would question but that the instigator and director in such case would be guilty of murder, although the principal could not be punished at all; and if A, by virtue of deceit or persuasion, induce B to kill himself, this is as much the act of A as though A had in-

duced C to kill B. The charge in the second count of the indictment is, that plaintiff in error did "hire, persuade and procure" the deceased to kill herself, and if he did either of these, and as a result thereof deceased did kill herself, it was the act of plaintiff in error, and we have no hesitancy in pronouncing it murder if the element of malice is found.

Counsel for plaintiff in error have ably and elaborately discussed the proposition that the second count is merely a charge against the plaintiff in error as an accessory, and that in order that there shall be an accessory there must be a principal, and as under our law suicide is not a crime, the act of the deceased in killing herself was not a criminal act and there was no crime committed. But when we apply the principle above announced, that the act of the principal, when done pursuant to the will and direction of the accessory, is the act of the accessory, then it becomes immaterial what was the character of the crime committed by the principal or whether there [224] was any crime, and in such case as this, where it is not shown or claimed that the accused directly administered the poison of which the deceased died, but that the taking of it was by his procurement, we should require strict proof of this latter fact. Though the plaintiff in error may have known that the deceased intended to kill herself, and may have assented to it, or may have even wished that she would do so, still, unless the evidence shows, beyond a reasonable doubt that he did or said something which aided, encouraged or induced deceased to kill herself, he cannot be held guilty of the charge of murder: White v. People, 81 Ill. 333; Jones v. People, 166 Ill. 264, 46 N. E. 723. The evidence that plaintiff in error did do or say anything that might by any possibility have been an inducement to the deceased to kill herself rested wholly upon his alleged admissions. Those admissions were made under such circumstances and when the plaintiff in error was in such condition, physically and mentally, as should have required the court to have made proper investigation before they were admitted at all, and if admitted to have fairly instructed the jury as to the character of and weight to be given to admissions and confessions made under the conditions here shown. This was especially so in view of the instructions of the court as to the substance of the crime. By the thirteenth instruction the jury were told that suicide was self-murder, and while this instruction is not complained of, and probably, as modified by what follows it, would not be reversible error even if objection had been made to it, the effect of it was to declare

that felonious which is not a felony under our law. The jury were also told that the plaintiff in error was permitted to testify in his own behalf, and stated the true test as to his credibility, and attached to that instruction the charge that if the accused had willfully and corruptly testified falsely to any fact material to the issue, the jury could entirely disregard his evidence, except in so far as it was corroborated. [225] There was no possible contradiction of the evidence of the plaintiff in error upon the material things testified to, except that growing out of his alleged admissions. There was not a single witness put upon the stand by the state to prove a substantial fact in the case outside of the corpus delicti, and, in fact, the whole case for both sides practically rested upon the testimony of the plaintiff in error and on his alleged statements to the police authorities. Plaintiff in error offered three instructions, which were refused by the court, which related to the alleged admissions. The first told the jury that confessions of a person, out of court, at best are a doubtful species of evidence, and should be acted upon by the jury with great caution, unless supported by other corroborative evidence. The fourth and fifth instructions were as follows:

"4. The court instructs the jury that where a confession of the prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as well that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant.

"5. The court instructs the jury that if they believe, from the evidence in this case, that the defendant, at the time he made the confession which has been given in evidence, was in a dazed and stupefied condition from the joint effect of intoxicating drink, morphine and the inhaling of illuminating gas, or from the effects of any one or any two of these agencies, and if the jury further believe, from the evidence, that the confession was elicited from the defendant by questions while he was in [226] such condition, then such confession is entitled to very little weight, and the jury would not be justified in convicting

the defendant upon said confession unless they find it is corroborated by other testimony in the case."

No instruction was given with reference to the weight or character of the testimony, such as is referred to in the instructions and was the main reliance for conviction. The fifth instruction is defective, and we could not say that it was reversible error to refuse it, for that reason. But no objection can be raised as to the fourth, and as all the alleged admissions of the plaintiff in error that were offered in evidence were mere verbal admissions, none of them rising to the dignity of a confession, between which and admissions there is a well-recognized distinction in the law, and as the admissions were drawn from the plaintiff in error by questions when in a condition that his mental status, was doubtful, the jury should have been told by some instruction that they should be received with caution: Marzen v. People, 173 Ill. 43, 50 N. E. 249; Ackerson v. People, 124 Ill. 563, 16 N. E. 847; Jones v. State, 29 Tex. App. 20, 25 Am. St. Rep. 715, 13 S. W. 990; Conner v. State, 34 Tex. 659; Commonwealth v. Howe, 9 Gray, 110. We think the refusal to give the fourth instruction was manifest error.

Some fifteen witnesses were, over the objection of plaintiff in error, allowed to testify as to the general reputation of the deceased, in the community in which she lived, for chastity. That question was not an issue in the case: 5 Am. & Eng. Ency. of Law, 2d ed., 872; Cannon v. People, 141 Ill. 270, 30 N. E. 1027; 3 Greenleaf on Evidence, 15th ed., par. 27. Her chastity had not been attacked except in so far as the nature of it appeared from her relation with plaintiff in error and the opening remarks of counsel for plaintiff in error. This evidence covered the life of the deceased for several years back, both in Illinois and Tennessee. There was nothing in the record justifying any such evidence as this. The witnesses all declared her general reputation for chastity [227] to be good. The plaintiff in error stood charged with her murder as the result of a liaison between them, and none can doubt but that the testimony thus admitted was calculated to, and did, prejudice the jury against the plaintiff in error. By it the natural inference arising in the minds of the jury was, that the deceased was a good and virtuous woman who had been despoiled by the plaintiff in error, and because of an affection produced by his effort they had mutually agreed to commit suicide sooner than separate. The only evidence as to their relation came from the admissions and testimony of plaintiff in error, and upon these

matters it was wholly uncontradicted; and not only that, but every part of it, as made to the various witnesses, was harmonious with every other part, and all tended to show that the deceased sought plaintiff in error; telephoned him at his office; would go to his office in the guise of a patient; would go to the drugstore under his place of business and send for him, and in a general way seek him out that she might be in his company. This was uncontradicted; yet the jury might feel warranted, from the evidence, in finding that the deceased was a woman of good character and chaste life when considering the precautionary instruction as to the weight that was to be given to the testimony of plaintiff in error, and their right to wholly disregard it if they believed he willfully swore falsely upon any material matter, and in concluding that her general reputation should weigh more in their estimation than his testimony as to the circumstances which brought and kept them together, and the probable influence plaintiff in error had in producing her death.

The judgment is reversed and the cause remanded to the criminal court of Cook county for further proceedings in harmony with this opinion.

Suicide.—It has been held that where one takes his own life upon the advice of another, the adviser is guilty of murder as principal: See the monographic note to Johnson v. State, 90 Am. St. Rep. 581. To constitute suicide, the person must be of years of discretion and of sound mind: Weber v. Supreme Tent etc., 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258. Suicide is not a crime in Illinois: Royal Circle v. Achterrath, 204 Ill. 549, post, p. 224, 68 N. E. 492.

Whether the Reputation of a Witness for Chastity can be inquired into for the purpose of affecting his or her credibility is considered in Hudson v. State, 41 Tex. Cr. Rep. 453, 96 Am. St. Rep. 789, 55 S. W. 492; Kolb v. Union R. R. Co., 23 R. I. 73, 91 Am. St. Rep. 614, 49 Atl. 392; State v. Tuttle, 67 Ohio St. 440, 93 Am. St. Rep. 689, 66 N. E. 524; State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022; note to State v. Sibley, 53 Am. St. Rep. 479-482.

IN RE APPEAL OF UNION TANK LINE COMPANY.

[204 Ill. 347, 68 N. E. 504.]

TAXATION OF CARS in Transit—Interstate Commerce.—Cars of a foreign corporation, other than a railroad company, which are in transit through the state, are instruments of interstate commerce and not taxable in such state. (pp. 222, 223.)

TAXATION OF CARS in Transit.—Cars of a foreign corporation, other than a railroad company, to whose domicile they are returned when not in use, are, while in transit through another state, not subject to taxation therein. (p. 223.)

TAXATION.—Credits of a Foreign Corporation payable at its home office where they are subject to taxation, cannot be taxed in another state. (p. 223.)

A. D. Eddy and J. A. Fullenwider, for the Union Tank Line Company.

H. J. Hamlin, attorney general, E. W. Sims, county attorney, and F. L. Shepard, for the Board of Review.

349 Per CURIAM. We think it sufficiently appears from the statement of facts submitted by the board of review to this court that the assessment of forty thousand dollars upon the property of appellant was made upon its one hundred and fifty tank cars, valued at five hundred dollars each, and money and credits of the value of one hundred and twenty-five thousand dollars, and that it was claimed by the company that such cars were merely in transit temporarily, if at all, in the city of Chicago on the first day of April, 1901, and therefore not subject to taxation in this state, and also that the moneys and credits due the company were payable at its home office in New Jersey, and therefore likewise exempt from taxation in Illinois.

On the question of the exemption from taxation by one state of cars owned by a corporation (not a railroad corporation) having its domicile in another state, the supreme court of Missouri, in the well-considered case of State v. Stephens, 146 Mo. 662, 69 Am. St. Rep. 625, 48 S. W. 929, where the authorities are fully cited, held adversely to the taxing power. The language used is as follows: "The relator is a corporation organized under the laws of the state of New Jersey, and is engaged at Kansas City, Missouri, in the 350 general packing business—that is, in killing and dressing food animals and in selling the meats thereof. It owns a number of refrigerator-cars, in which it ships its goods to various counties in this state and to other states in the Union. Its cars are hauled by various railroads.

It appears from the petition that the relator's place of business is in Kansas City, in the state of Kansas, and that the cars here taxed are attached to its business as an incident thereto, and are loaded in the state of Kansas and shipped into and through the state of Missouri. These allegations are not denied by the return, and hence they must be taken as true in this case. Under the circumstances, the relator, though a foreign corporation as to the state of Kansas, has acquired a domicile in that state, and the cars can only be taxed in that state: Comstock v. Grand Rapids, 54 Mich. 641, 20 N. W. 624; City of Dubuque v. Illinois Cent. R. R. Co., 39 Iowa, 83; British Commercial Life Ins. Co. v. Commissioner of Taxes, 31 N. Y. 32; Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876; Cleveland etc. Ry. Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. Rep. 1122; Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. Rep. 268; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527; Hall v. American etc. Transit Co., 24 Colo. 291, 65 Am. St. Rep. 223, 51 Pac. 421. The reason of the rule is, that the cars could not be reached for assessment and taxation anywhere else, and the company owes this just return to the state of Kansas for the protection it receives from it. The cars are in the state of Missouri only in transitu and have no situs in this state, hence they are not subject to assessment or taxation in this state: Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857; California v. Northern Ry. Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073; Reading Ry. Co. v. Pennsylvania, 15 Wall. 232; People v. Wemple, 138 N. Y. 1, 33 N. E. 720; 2 Dillon on Municipal Corporations, secs. 787, 788. Being in Missouri only in transit, for the purpose of bringing merchandise from another state into or through this state, they are instruments of interstate commerce, and this state cannot impose any tax on them: Telegraph Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 [351] U. S. 640, 8 Sup. Ct. Rep. 1380; Pickard v. Pullman etc. Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826; Reading Ry. Co. v. Pennsylvania, 15 Wall. 232; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250. Being instruments of interstate commerce, Congress alone has jurisdiction over them under section 8, article 1, of the constitution of United States. Except as above indicated, the cars can be taxed as property by

the state in which the company has acquired a domicile and the cars have a situs."

The facts in the case above quoted from are quite similar to those in the case at bar. Appellant's principal office is in New Jersey. Its cars, when not in use, are returned to that state. All its business affairs are regulated and managed from that office, except the mere matter of tracing the cars and some minor details. Bills due it are payable at that office, and, in fact, its domicile is in the state of New Jersey. Its personal property has its situs there and is there subject to taxation by that state in return for the protection afforded by that state to the company. The taxation of appellant's cars in this state would be an unwarranted interference with interstate commerce, over which Congress has exclusive control. In fact, it is not contended, but is substantially admitted, that cars of a foreign corporation (not a railroad corporation) in transit through this state are not subject to taxation here. That appellant's credits, which it is not disputed were payable at its home office in New Jersey, are not subject to assessment here, is settled by the case of Scripps v. Board of Review, 183 Ill. 278, 55 N. E. 700, and cases cited.

For the reasons indicated the action of the board of review is disapproved, and appellant's assessment, except as to the one thousand dollar assessment made by the board of assessors, is held void.

The Situs of Personal Property for purposes of taxation is the subject of a monographic note to Buck v. Miller, 62 Am. St. Rep. 448-477. And the situs of credits due a foreign corporation is discussed in Armour Packing Co. v. Augusta, 118 Ga. 352, 45 S. E. 424, ante, p. 128, and cases cited in the cross-reference note thereto. It has been held that railway cars which are in a state only in transitu have no situs therein, and hence cannot be taxed by it: State v. Stephens, 146 Mo. 662, 69 Am. St. Rep. 625, 48 S. W. 929. But see Hall v. American Refrigerator etc. Co., 24 Colo. 291, 65 Am. St. Rep. 223, 51 Pac. 421. As to the situs for taxation of ocean-going tugs, see Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95, 87 Am. St. Rep. 747, 64 Pac. 909.

ROYAL CIRCLE v. ACHTERRATH.

[204 Ill. 549, 68 N. E. 692.]

BENEFIT SOCIETIES—Insurance—Suicide.—It is presumed that the holder of an insurance benefit certificate was sane at the time he committed suicide. (p. 225.)

INSURANCE, LIFE—Incontestable Clause.—Stipulations in a life insurance policy or benefit certificate that it shall become incontestable for fraud in procuring it after the lapse of a specified period from the date of its issue, are valid as creating a short statute of limitations in favor of the insured. (p. 226.)

INSURANCE—Incontestable Clause—Suicide.—If a life insurance policy or benefit certificate provides that it shall be incontestable after a certain period, except for certain causes, death by suicide not being one of them, the incontestable clause applies in case of the death of the insured by suicide, although the policy contains another clause, providing that death by suicide is not a risk assumed by the insurer. (p. 226.)

INSURANCE.—Incontestable Clause in insurance policies or benefit certificates is liberally construed in favor of the insured. (p. 226.)

BENEFIT SOCIETIES—Suicide—"Loss of Good Standing." If a by-law of a benefit society makes a certificate of membership incontestable, after two years, if the member continues "in good standing," obeys the rules and by-laws, and pays his dues and assessments, his death by suicide is not a loss of good standing, especially when action by the society is necessary to deprive him thereof. (pp. 228, 229.)

BENEFIT SOCIETIES—Evidence of Good Standing.—The certificate issued to a member of a benefit society is evidence of his good standing at the time of its issue, and such good standing is presumed to continue until there is proof that it no longer exists. (p. 229.)

BENEFIT SOCIETIES—Good Standing—Suicide.—If loss of good standing on the part of a member of a benefit society must be established by action on the part of the society, such loss of good standing does not include the act of the member in committing suicide. (p. 229.)

BENEFIT SOCIETIES—Suicide as Avoiding Certificate.—Suicide is not a crime. Hence suicide by a member of a benefit society does not avoid his insurance under a provision in the constitution of the society rendering his certificate void if the insured dies on account of a violation of any criminal law. (p. 231.)

D. E. Minor, Dunn & Kenney and Risse & Risse, for the appellant.

A. W. O'Harra and S. P. Lemon, for the appellee.

558 MAGRUDER, J. In the case at bar the proof shows that William Archterrath, to whom the benefit certificate sued upon was issued, died by his own hand. While the affirmative

proof in the case does not show whether the deceased was sane or not at the time of his death, yet there is no proof that he was in such a state of mind as to be unconscious of the physical nature of the act of self-destruction, and, therefore, in the absence of any proof as to his insanity, all the presumptions are in favor of his sanity: Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; Dickerson v. Northwestern Mut. Life Ins. Co., 200 Ill. 270, 65 N. E. 694. It follows that, under the terms and provisions of the benefit certificate, and of the application for membership, and of the constitution and by-laws of the appellant association, except those contained in section 1 of article 16 of the constitution of the order, the appellant would not be liable to the appellee in this suit. Consequently the real and substantial, and only material, question in the case is, whether the remaining fifteen hundred dollars due upon the face of the benefit certificate is indisputable and incontestable by the appellant [559] on account of the provision contained in section 1 of article 16 of the constitution, that section being indisputably a part of the contract between the society and the insured. In other words, is the appellant estopped from refusing payment on account of Achterrath's death by suicide, by reason of the "incontestable clause," quoted in the statement preceding this opinion as section 1 of article 16 of appellant's constitution?

Section 1 of article 16 provides that, "after two years from the date of a certificate, the member continuing in good standing, the only conditions binding upon the member are the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments shall be paid as required. In all other respects the payment of any sum, due under any certificate issued to a member, shall be indisputable and incontestable."

Before proceeding to consider the proper meaning and interpretation of this incontestable clause, it may be well to refer to some of the authorities, which have considered the force and effect to be given to such clauses. Courts have frequently recognized the validity of clauses, making policies of life insurance, and benefit certificates in benevolent associations, incontestable by the company or association under certain conditions. Stipulations to the effect that a policy, or certificate, shall become incontestable for fraud in procuring the same after the lapse of a specified period from the date of its issue, have been held valid as creating a short statute of limitations in favor of

the insured, and as giving the insurer a limited period for the purpose of testing the validity of the policy. In such cases, the company or association cannot set up fraud as a defense, if the period so fixed is sufficient to enable the company, or association, by the exercise of proper diligence to ascertain whether fraud has been practiced or not. Such clause, making a policy or certificate incontestable for fraud, [560] have fixed such period at from one to three years from the date of the issuance of the policy, or certificate: Massachusetts Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918; Patterson v. National Premium Mut. Life Ins. Co., 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980; Wright v. Mutual Ben. Life Assn., 118 N. Y. 237, 16 Am. St. Rep. 749, 23 N. E. 186; Clement v. New York Life Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561. "It has been held that, where a policy provides that it shall be incontestable after a certain period, except for certain causes, death by suicide not being one of the excepted causes, such clause will apply in case of the death of the insured by suicide, notwithstanding the policy contains another clause, providing that death by suicide is not a risk which the company assumes": 19 Am. & Eng. Ency. of Law, 2d ed., 80; Mareck v. Mutual Reserve Fund Life Assn., 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68; Goodwin v. Provident Sav. Life Assur. Assn., 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157; Simpson v. Life Ins. Co., 115 N. C. 393, 20 S. E. 517; Mutual Reserve Fund Life Assn. v. Payne (Tex. Civ. App.), 32 S. W. 1063; Murray v. State Mut. Life Ins. Co., 22 R. I. 524, 48 Atl. 800; Kline v. National Ben. Assn. 111 Ind. 462, 60 Am. Rep. 703, 11 N. E. 620. In interpreting incontestable clauses, several well-known rules of construction are adopted as being peculiarly applicable to contracts of this class. One of these rules of construction is, that such contracts are to be liberally construed in favor of the insured. In National Bank v. Insurance Co., 95 U. S. 673, it was said that "the policy having been prepared by the insurers, it should be construed most strongly against them." In Thompson v. Phenix Ins. Co., 136 U. S. 297, 10 Sup. Ct. Rep. 1019, it was said: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured": See, also, Massachusetts Life Assn. v. Robinson, 104 Ga. 277, 30 S. E. 918. In the American and English Encyclopedia of Law, volume 19, second edition, page 80, it is said: "In regard to matters, which would have the effect of defeating or destroying the con-

tract, if there is a reasonable doubt as to the extent of the application of the incontestable clause, it must be solved in favor of the beneficiary, and [561] stipulations in the policy to the contrary must yield. Thus it has been held that a clause in the policy, providing that 'if the terms of this contract be complied with, it shall be incontestable after one year from its date,' though the meaning is somewhat doubtful, will relieve the insured from the effect of a false warranty after the expiration of one year. . . . . So, it has been held that, where a policy omits the 'suicide clause,' but contains a clause making it absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatement of age, intentional suicide while sane, although technically a crime, cannot be set up as a defense under another clause of the policy, in effect providing that death 'in consequence of or in violation of law' is not a risk covered by the policy."

So, in Mareck v. Mutual Reserve Fund Life Assn., 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68, it was said: "If there is a reasonable doubt as to the extent of the application of the 'incontestable clause,' it must be solved in favor of the beneficiary. This clause was inserted in the contract by the company itself. . . . . Another reason why the insured might well understand the clause as meaning this [that is, that the company agreed to waive the condition as to suicide after five years], and why the company itself may have intended it to have that meaning, is the fact that it is the custom of many life insurance companies to limit the operation of conditions as to suicide to a fixed period, and to make their policies thereafter incontestable on that ground." In the case last referred to of Mareck v. Mutual Reserve Fund Life Assn., 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68, there was written in ink across the face of the policy, and forming a part of it, the following: "After five years from the date of this certificate, it is incontestable for any cause, except nonpayment of dues or mortuary assessments at the times and places, and in the manner herein provided, the age of the member being correctly stated in the application for this certificate"; the age of the insured was correctly stated in his [562] application, and all dues and mortuary assessments were duly paid up to the time of his death; and, more than five years after the date of the certificate, the insured came to his death by his own hand; and it was there held that the incontestable clause applied, and that the company was liable for the full amount named in the life insurance policy. In

Goodwin v. Provident Sav. Life Assur. Assn., 97 Iowa, 234, 59 Am. St. Rep. 411, 66 N. W. 159, it appeared that, by the terms of the policy, it was incontestable after two years from its date, except for fraud in procuring it, subject, however, to stipulations regarding payments of premiums and extrahazardous occupations, and it was there said by the court: "The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. . . . . The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide, occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein. This construction will give effect to all the provisions of the policy, and as such a result is always sought for by courts in interpreting all classes of contracts, we are quite content with it. We are the better satisfied with this conclusion, because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide to a fixed period, and make their policies incontestable on that ground thereafter."

An application of the rules, thus announced in relation to these incontestable clauses in policies of insurance and benefit certificates, leads to the conclusion that [563] the appellant is estopped from denying its liability to the appellee upon the benefit certificate, here sued upon, by reason of the provision contained in section 1 of article 16 of the constitution. It is claimed by the appellant, that William Achterrath did not continue in good standing by reason of the fact that he committed suicide. When the constitution provides that, "after two years from the date of a certificate, the member continuing in good standing, the only conditions binding upon the member are the agreements," etc., it is not meant that, by the act of taking his life, the member does not continue in good standing. The meaning is, that he must continue to be in good standing during the period of two years after the issuance or date of the certificate, and up to the time of his death. The loss of good standing, as here contemplated, is not such loss as that occurring by the act of death, but the reference is to such good standing as

exists up to the time of the death. The life of the insured is ended the moment the act of suicide is performed, and there is no interval for loss of good standing in the order. In the next place, section 1 of article 14 of appellant's constitution, as quoted in the statement preceding this opinion, provides for affirmative action to be taken by the order in case of any offense against the order being committed by the member. The accused must be given an opportunity to be heard, and evidence must be taken by a committee, and a report made to the lodge, and a vote had upon the report or recommendations of the committee. As the loss of good standing of the member must be established by a trial and conviction of the offense charged against him, it cannot be said that suicide is such a loss of good standing as is contemplated by section 1 of article 16, as no investigation or trial could occur to establish the loss of good standing after a member's death.

When a certificate of membership is issued to a member, that certificate is evidence of his good standing at [564] the time of its issue, and such good standing will be presumed to continue until there is proof that it no longer exists. A member is said to be in good standing when he complies with the laws, rules, usages and regulations of the order. Such compliance necessarily includes punctual payment of all dues and assessments, for which the member may become liable. Good standing also means good conduct; that is, freedom from the violation of those requirements, which indicate the benevolent purposes of the society, or express its intention to insist upon a high standard of character among its members: Independent Order of Foresters v. Zak, 136 Ill. 185, 29 Am. St. Rep. 318, 26 N. E. 593; Royal Templars of Temperance v. Curd, 111 Ill. 284. The words of the certificate here sued upon are as follows: "Provided always that said member is in good standing in this order at the time of said death." In relation to words of a similar kind, we said, in Independent Order of Foresters v. Zak, 136 Ill. 185, 29 Am. St. Rep. 318, 26 N. E. 593: "Under such a constitution as that of appellant, the loss of good standing must be shown by some official action on the part of the organization. . . . . The order is a corporate body. The attitude of a corporate body toward one of its members can only be known through its action as such corporate body. . The only proper evidence of such action will be the records or proceedings of the organization itself." It is clear that, inasmuch as loss of good standing on the part of a member must be thus established by corporate action, such

loss of good standing does not include the act of the member in committing suicide: See, also, Niblack on Accident Insurance and Benefit Societies, 2d ed., secs. 155-157; also sec. 323. At section 323 of the second edition of Niblack's work on Accident Insurance and Benefit Societies, the author says: "Proof that the society recognized the decedent as a member up to a short time before his death, in connection with the presumption that all persons follow such laws, rules and regulations as they are subject to is sufficient evidence of the good [565] standing of decedent to maintain the action." It is not denied, in this case, that the deceased, William Achterrath, paid all his dues, and conformed in every respect to such requirements of the society as entitled him to a good standing up to the time of his death, independently and outside of the fact that he died by his own hand: 2 Bacon on Benefit Societies and Life Insurance, 2d ed., sec. 414.

Again, the constitution and by-laws of the appellant society, which are a part of the contract made by it with the deceased, recognize a distinction between loss of good standing in the society, and self-destruction. A member's certificate may become void by his loss of good standing in the order, but such loss of good standing is determined, as a general thing, by a trial and conviction in the order. When, however, a member takes his own life, no trial can be had, and none is required by the constitution of the order. The act of suicide works a forfeiture of the certificate, not because the member is thereby deprived of his good standing in the order at the time of his death, but because, aside from all question of good standing, it is especially provided that suicide in and of itself shall defeat a recovery. If the intention was, that loss of good standing in the order always occurred when death was from self-destruction, then there would be no occasion for providing especially against suicide. In such case, it would only be necessary to provide generally that loss of good standing should work a forfeiture of the policy; and if the commission of suicide is included in the loss of good standing, the special provisions against suicide would be unnecessary.

Counsel for appellant, however, claim that suicide is a crime, and that, therefore, the appellant is not liable under the provisions of its constitution, which make the certificate null and void, if a member dies on account of the violation of any criminal law of any state, province or municipality. But suicide is not a crime under the [566] statutes of this state. In New

York, although suicide is not a crime, an attempt to commit suicide is a crime, but it has been held in that state that the fact that a member killed himself is not a defense to an action under a provision of the contract that it should be void if he should die "in violation of, or attempt to violate, any criminal law": Darrow v. Family Fund Soc., 116 N. Y. 537, 15 Am. St. Rep. 530, 22 N. E. 1093. In Kerr v. Minnesota Mut. Ben. Assn., 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312, where a policy of insurance provided that, "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state or territory in which the assured may be, this certificate shall be null and void," it was held that death by suicide is not within the proper meaning of the policy, to be considered as the violation of law therein referred to; and in that case it was said by the supreme court of Minnesota: "And under the general language here used, which must be construed favorably to the assured and strictly as against the company, the violation of law referred to in the policy ought not, we think, to be construed to mean or include suicide. Suicide, though strictly a crime, is not reckoned among offenses or violations of law, such as the language of the policy would be commonly understood to refer to."

Counsel for appellant also say that, while suicide itself may not be a crime, yet the attempt to commit suicide is a crime. But "an attempt to commit crime imports a purpose not fully accomplished to commit it. It is the attempt to commit suicide that is the crime, while the taking of one's own life is no violation of the criminal law. . . . . While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not": Darrow v. Family Fund Soc., 116 N. Y. 537, 15 Am. St. Rep. 530, 22 N. E. 1093. In the case at bar, suicide was actually accomplished, and, therefore, it cannot be said that the deceased was guilty of the attempt to commit suicide. "If the act fails to accomplish its purpose, it constitutes an attempt, but if the [567] result of it is the consummation of the purpose, the act is not commonly designated as an attempt": Darrow v. Family Fund Soc., 116 N. Y. 537, 15 Am. St. Rep. 530, 22 N. E. 1093.

The benefit certificate, issued to the deceased, was issued January 19, 1899, and his death took place May 8, 1901, more than two years after the issuance of the certificate. Inasmuch as he continued to be in good standing up to the time of his death, the question arises as to the meaning of that part of

section 1 of article 16, which reads as follows: "The only conditions binding upon the member are the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments shall be paid as required. In all other respects the payment of any sum due under any certificate issued to a member shall be indisputable and incontestable." After the expiration of the two years from the date of the certificate, the only conditions binding upon William Achterrath were the agreements as to his full compliance with the laws and rules of the association, and that all dues and assessments should have been paid as required. It is not denied that he paid all dues and assessments as required; and the only question remaining is, whether the agreements as to his full compliance with the laws and rules of the association include or exclude the provisions in regard to suicide and self-destruction.

The certificate in this case provides that the statements and representations, made by Achterrath in the petition or application for his membership in the circle, shall be made a part of the contract embodied in the certificate. When we look at the application for membership, we find two agreements embodied in the eighth and ninth clauses of the application, and following the one upon the other. By the first of these agreements, Achterrath says, "I further agree that the order shall not be responsible under this contract, if . . . . I shall die . . . . by suicide, whether sane or insane," etc. [505] By the terms of the second agreement, embodied in clause 9, he says: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the constitution, laws, rules, and usages of this order now in force, or which may hereafter be adopted by the supreme circle thereof." By agreeing that the order shall not be responsible under the contract if he should die by suicide, whether sane or insane, he made an agreement which stood by itself, and was not dependent upon anything in the constitution, laws, rules or usages of the order. It is not to be presumed that, when he made the agreement embodied in the ninth clause of the application, it was intended to repeat what was agreed to in the eighth clause. Therefore, when by the ninth clause he agreed to conform in all respects to the constitution, laws, rules and usages of the order, the intention evidently was to refer to such parts of the constitution, laws, rules and usages of the order as were not embraced in what was agreed to by the terms of clause 8. If the language in clause 9 was broad enough to cover the agree-

ment that the order should not be responsible in case of his death by suicide, then it was unnecessary to make the separate agreement in regard to dying by suicide, which is embodied in clause 8. In construing two clauses of a contract following one upon the other, a construction will not be adopted, which makes one a repetition of the other. It is true that, by section 5 of article 10 of the constitution, it is provided that "if a member dies . . . . by self-destruction . . . . the certificate of membership shall be null and void." But all upon this subject that is embodied in section 5 of article 10 of the constitution is contained in the agreement made by the insured in clause 8 of the application. It is, therefore, to be presumed that the agreement in clause 9 of the application did not refer to that part of section 5 of article 10 of the constitution which refers to self-destruction.

When, now, we come to section 1 of article 16 of the constitution of the order, we find substantially the same language, which is embodied in clause 9 of the application. This application is made out upon a blank furnished by the order itself. Sections 1 and 3 of article 6 of the constitution refer to the subject of filling out the blank application by the applicant, and the signing of it by him, and to the report of the committee upon the application, and to the indorsement to be made upon the application, and to the approval of the application by the supreme medical director, and the return of the same to the office of the supreme secretary; and it is specifically stated that "each application for membership and indemnity must be in writing on blanks furnished by the order." The agreements, embodied in clauses 8 and 9 of the application in the present case, are parts of a printed blank furnished by the order. Unquestionably, the language of this printed blank was in the mind of the order when it framed section 1 of article 16. The following words in that section, to wit, "the agreements as to his full compliance with the laws and rules of the association," are substantially the same as the language used in clause 9 of the application. It is to be presumed, therefore, that the reference in section 1 of article 16 of the constitution is to the agreement embodied in clause 9 of the application, and not to the agreement embodied in clause 8 of the application. This conclusion receives indorsement from the fact that, in clause 9, the agreement is "to conform in all respects to the constitution, laws, rules and usages of this order," etc. The language in section 1 of article 16 is, "the agreements as to his full compliance

with the laws and rules of the association." It will be observed that, in section 1 of article 16, the word "constitution" is left out, and the words "laws and rules" are used. The provision, that, "if a member dies . . . . by self-destruction . . . . the certificate of membership shall be null and void," is a part of [570] the constitution of the order, that is to say, it is section 5 of article 10 of the constitution. But the agreements, mentioned in section 1 of article 16 do not refer to the constitution, but only to the laws and rules of the association. It cannot be supposed, therefore, that section 1 of article 16 referred to that provision of the constitution, embodied in section 5 of article 10. It is true that the word, "rules," is sometimes used in a sense sufficiently broad to embrace such rules as are embodied in the constitution, as well as in the by-laws. But the omission of the word "constitution" from section 1 of article 16, when the same was used in clause 9 of the application, possesses a peculiar significance with reference to the interpretation of the language now under consideration.

It is thus apparent that if, after two years from the date of the certificate, the member continued in good standing—and such was the fact in regard to William Achterrath—the only conditions after that date binding upon him were the agreements as to his full compliance with the laws and rules of the association, and not such other agreements as were made independently and outside of the laws and rules of the association. It follows that the words, "in all other respects the payment of any sum due under any certificate, issued to a member, shall be indisputable and incontestable," were intended to mean that the benefit certificate should be incontestable after two years, except for certain conditions, among which suicide was not embraced. Our opinion is, that here the incontestable clause applies, even though the insured came to his death by suicide. The only conditions, binding upon the member remaining in good standing after the lapse of the two years, did not embrace any agreements in regard to suicide or death by his own hand. At any rate, the language of section 1 of article 16 leaves it doubtful whether such was the case or not. This being so, the rule applies that. where there is a reasonable doubt as to the extent of the application of [571] the incontestable clause, it must be solved in favor of the beneficiary.

The action of the trial court in ruling upon the evidence, and in the giving and refusal of instructions, was in accordance substantially with the views here announced. The judgments of

the appellate and trial courts were based upon the theory that, under section 1 of article 16, the appellant was estopped from refusing payment on account of Achterrath's death by self-destruction. We think that they adopted the correct theory, and gave the correct interpretation to section 1 of article 16.

Accordingly, the judgment of the appellate court is affirmed.

If an Insured Person Commits Suicide, there is no presumption that the self-destruction arises from insanity: Grand Lodge etc. v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59. It is generally held that the burden of proof is on those claiming under the policy to establish his insanity: Note to Meadows v. Insurance Co., 50 Am. St. Rep. 443. To constitute suicide, the person must be of sound mind: Weber v. Supreme Tent etc., 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258. Unless a policy of insurance stipulates against suicide, the suicide of the assured is not a defense to an action on the policy by his beneficiary: Supreme Conclave etc. v. Miles, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845. A stipulation against suicide, however, is valid: Chambers v. Knights of Maccabees, 200 Pa. St. 244, 86 Am. St. Rep. 716, 49 Atl. 784; monographic note to Supreme Conclave etc. v. Miles, 84 Am. St. Rep. 553. Yet if the policy contains an incontestable clause, the self-destruction of the insured does not necessarily avoid the contract of insurance: Goodwin v. Provident etc. Assur. Assn., 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 167; Mareck v. Mutual etc. Life Assn., 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68. See, also, Insurance Co. v. Fox, 106 Tenn. 347, 82 Am. St. Rep. 885, 61 S. W. 62. The presumption is against death by suicide: Cox v. Royal Tribe, 42 Or. 365, 95 Am. St. Rep. 752, 71 Pac. 73.

GAYLORD v. SANITARY DISTRICT OF CHICAGO.

[204 Ill. 576, 68 N. E. 522.]

CONSTITUTIONAL LAW—Eminent Domain.—A statute which authorizes the condemnation of private property for the purpose of public mills, and machinery other than public gristmills is unconstitutional and void, as permitting the taking of private property for a private use. (p. 239.)

EMINENT DOMAIN—Public Use.—To constitute a public use such as will justify the taking of private property under the right of eminent domain, something more than a mere benefit to the public must flow from the contemplated improvement, and the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. (p. 240.)

EMINENT DOMAIN—Public and Private Use.—Authority to take private property under the exercise of the right of eminent domain for a public use does not confer the right to condemn private property for a public and also a private use. (p. 241.)

C. A. Munroe and T. A. Moran, for the appellant.

J. P. Wilson and H. S. Robbins, for the appellee.

578 WILKIN, J. Appellant filed his petition in the circuit court of Will county, in conformity with the eminent domain law of this state, against appellee and others, alleging that "he is the owner of the bed and banks of the Des Plaines river in sections 20 and 21, township 35 north, range 10 east of the third principal meridian, from the south line of section 16 to the west line of section 20; that he is about to build a public gristmill, and also construct other machinery, as well as also the improvement of the 579 navigation of the Des Plaines river at a point on said land described as follows [here follows description]; that in order to construct, operate and equip said public gristmill and other public machinery, and also the improvement of the navigation of the Des Plaines rives, it is necessary to take and injure private property without the owner's consent; that the parties with whom petitioner is unable to agree as to their just compensation are the Atchison, Topeka and Santa Fe Railroad Company . . . . and the Sanitary District of Chicago." Then follows a description of a particular piece of land in which the sanitary district has an interest, with the prayer that a jury be impaneled to assess the damages in pursuance of the provisions of "An act in regard to mills and millers," etc., approved March 2, 1872, and in force July 1, 1872: Rev. Stats. 1874, p. 701.

Petitioner was able to agree with all the defendants as to their just compensation except the Sanitary District of Chicago, which appeared in the circuit court, and entered its motion to dismiss the petition: "1. Because this statute is unconstitutional, in that it attempts to authorize the taking of private property without the owner's consent for a private, and not a public, use; 2. Because petitioner seeks by this proceeding to acquire the property for a private use, and this claim that he desires to equip and operate a public gristmill is a mere subterfuge under which he seeks to acquire the property for the mere private purposes of developing an extensive water power; 3. Because the property sought to be taken had been acquired and was used by appellee for the purpose of carrying off the sewerage of Chicago, and being thus already devoted to a public use could not be taken by appellant under this statute, which contemplates only the taking of private property." Evidence was heard in support of and against the motion, and an order en-

tered sustaining the same, to reverse which appellant prosecutes this appeal.

580 Section 1 of the statute under which appellant claims the right to condemn the property of appellee provides as follows: "When any person or persons owning land on one or both sides of any stream or watercourse, any part of the bed of which belongs to such person or persons, shall desire to build or repair any public gristmill, sawmill or other public mill or machinery, or to erect, repair or increase in height any dam across such stream or watercourse, to supply water for any such mill or machinery, or to improve the navigation of any such stream or watercourse for the use of such mill or machinery, and it shall be necessary to take or injure private property without the owner's consent, and the compensation therefor cannot be agreed upon by the parties interested, it shall be unlawful for the person or persons desiring to build or repair such mill or machinery, or to erect, repair or increase the height of any such dam, to cause the damage or compensation to be paid to the owner or other person interested in the property to be taken or injured, to be ascertained in the manner provided by law for the taking or damaging of private property for public use; provided," etc. Other sections provide that no dam shall be erected to the injury of any mill lawfully existing on the same stream nor to the injury of the health of the neighborhood, and the right to the judgment of condemnation shall be availed of within a certain time, otherwise, to revert, etc. Section 6 prescribes the duty of the owner or occupier of every public gristmill within the state, requires him to grind the grain brought to his mill in due turn, and authorizes him to take certain tolls for different kinds of grain, The next section attaches a penalty for his failure to promptly and punctually attend to the duties imposed. Section 8 makes him accountable for the safekeeping of grain received in his mill for the purpose of being ground, and section 9 imposes a penalty for taking illegal tolls. Section 11 relates to dams erected across any river or watercourse 581 in this state under the authority of any law of this state, and has no application to this case.

This class of statutes has been in force in this and many other states of the Union from a very early day—in Illinois and several others while yet under territorial organization—and are generally known as "mill acts." They were manifestly passed at a time when water power was practically the only

means of running such mills, and which, in the then existing condition of society, were a public necessity. As was to be expected, in view of the demands for mills to grind grain for food and to saw timber into building material for the erection of houses, as well as of the fact that land had little or no market value, these laws were enforced and acquiesced in for a great many years, until valuable rights had been acquired under them. Those of Illinois found in Laws of 1819, page 264, Revised Code of 1827, page 297, and Revised Laws of 1833, page 449, were each limited to water gristmills and sawmills, except that of 1819, which was confined to gristmills. They were never called in question, so far as we are advised, and certainly not in this court. The later statutes in other states, like the act under which this proceeding is brought, have attempted to extend the power to other than public gristmills, authorizing the taking or damaging of private property for the erection and operation of mills generally, our statute, as will appear from the first section quoted above, extending to "other public mill or machinery," and "to improve the navigation of any such stream or watercourse for the use of such mill or machinery." When mill acts came to be questioned, many considerations conspired to influence the courts to be inclined to sustain them, and hence decisions are to be found placing their validity upon various grounds. In every instance, so far as we are advised, acts providing for condemnation proceedings for the benefit of public gristmills have been upheld upon the ground that taking private property for that purpose is [582] for a public use, and not for a mere individual purpose; and some of the ablest courts of last resort have sustained laws authorizing the taking or damaging of land for water power for running mills, and factories generally, by water power. See cases cited in note to section 180 of Lewis on Eminent Domain, where the author says: "The constitutionality of acts for this purpose has been seriously questioned, but nevertheless upheld either on the ground of authority or on long and general acquiescence and usage, in Iowa, Kansas, Maine, Minnesota, Nebraska and Wisconsin. On the other hand, such acts have been held to be unconstitutional, as authorizing the taking of private property for private use, except in the case of public mills, in the states of Alabama, Georgia, Michigan, New York, Vermont and West Virginia."

The supreme court of the state of Massachusetts, and other courts, and the supreme court of the United States, have sus-

tained acts which gave the right to have the damages assessed for overflowing the lands of another by the erection of dams for operating mills and other machinery, not upon the right of eminent domain, but on the theory that the statutes do not authorize the taking or damaging of private property at all—that is, that "it is not a right to take and use the land of the proprietor above against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community"; that it is "a provision, by law, for regulating the rights of proprietors on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it": Bates v. Weymouth Iron Co., 8 Cush. 548; approved and adopted in Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441. These and other cases also seem to proceed upon the idea that that which is a public benefit amounts to a public use.

As already said, the validity of our present statute, in so far as it extends the right of condemnation to sawmills [583] or other public mills or machinery, or to improve the navigation of any stream or watercourse on which the same may be situated, "for the use of such mill or machinery," has never been passed upon by this court, and it seems clear that in view of the language of the statute, the constitution of this state and the holdings of this court as to what is a public use, within the meaning of the constitution, and what a taking or damaging of private property, there is no escape from the conclusion that it must be held unconstitutional and void. In reaching this conclusion it is not necessary to dissent from the views of the supreme court of the United States and other courts holding a similar doctrine, for the reason that our statute is in no sense confined to the ascertainment of damages or just compensation for overflowing the lands of another, but authorizes the proceeding whenever "it shall be necessary to take or injure private property without the owner's consent, and the compensation therefor cannot be agreed upon by the parties interested." The necessity may, or may not, arise from the flowage of the lands of another. Moreover, it by express terms authorizes the owner, etc., "to take or injure private property," and allows the assessment of damages or compensation to be paid to the owner or other person interested in the property "to be taken or injured to be ascertained," etc. In other words, it is a statute authorizing the taking or injuring of

private property under the right of eminent domain. If it were otherwise, there could be no question under our decisions, and, in fact, under the decisions of all the courts, including the supreme court of the United States, that the right which appellant seeks to enforce by his petition—that is, to overflow appellee's lands—would amount to taking its property: Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec 392; Rigney v. City of Chicago, 102 Ill. 64. Lewis, in his work on Eminent Domain, second edition, section 183, says: "There can be no question, it seems to us, but that the flooding of land by a mill-dam is a taking. [564] It interferes with the right to have the water of the stream flow off in its accustomed manner, and excludes the owner from the use and enjoyment of so much of the land as is covered by water, and may greatly deteriorate that which is not flooded. This has been expressly held to be a taking by the supreme court of the United States and by almost every court in the Union": Citing Pumpley v. Green Bay Co., 13 Wall. 166. At section 67 he further says: "Where works are constructed below the land of a proprietor, such as a bridge or dam or alteration of the channel, which causes the water to set back and overflow the land of such proprietor, there is a violation of such right, and if the works are authorized by law there is a taking, for which compensation must be made": Citing cases from almost all the states.

It is also the settled doctrine of this court that to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right: Chicago etc. R. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Chicago Dock Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631. It may be doubted whether the legislature in fact intended to extend the right of eminent domain to other than public gristmills. It carefully defines such mills, and prescribes the duties of the proprietors thereof and the rights of the public, making no mention whatever as to what is meant by the expression, "other public mill or machinery." What is a public mill? What is a public machinery? We find nothing in the statute, or elsewhere, answering these inquiries, nor is there anything in petitioner's petition indicating what

kind of "other public machinery" he is about to build. It is apparent that he does not seek merely to establish the right to build a public gristmill, but, as shown by his petition, his purpose was, and is, [585] to take or injure the property of appellee for the purposes of other mills or machinery. The evidence which was heard by the court below fully justifies the conclusion that for all the purposes of a public gristmill his own property affords ample facilities for the production of more power than could be practicably used for a gristmill. Moreover, if the taking of private property for other public mills or machinery is not for a public use, it must be conceded, at most, that he seeks to condemn private property for a public and a private use, which the law will not permit him to do: Chicago etc. Ry. Co. v. Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674. In Lewis on Eminent Domain, volume 1, second edition, section 206, note 33, it is said: "Thus, under an act for the erection of gristmills, an order of the court condemning land for the gristmill, sawmill and paper-mill is void": Citing authorities. Our statute does not authorize a condemnation proceeding for the improvement of the navigation of a stream generally, as counsel seem to argue, but only "for the use of such mill or machinery." Hence, if the object is to improve the navigation of the Des Plaines river for the use of public mills or machinery other than public gristmills, the improvement of the navigation is no less a taking of private property for private use than the erection of "other public mills or machinery." If the petitioner can maintain this petition, he can undoubtedly establish and operate by the water power acquired every species of machinery and establish any kind of manufactories, or he may transmit and sell the power wherever he can find a market for it. This would certainly be carrying the right of eminent domain to an alarming and dangerous extent.

Passing upon the validity of an act of the state of Michigan enacted in 1865, not materially different from the Illinois statute of 1872, the supreme court of that state, in Byerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564, said, Mr. Chief Justice Cooley rendering the opinion: "Unlike the act of [586] 1824, the act of 1865 clearly appears to contemplate other mills than those for the grinding of grain. The title of the act would indicate a purpose to give every species of manufacture which could profitably be carried on by means of water power the

benefits of its provisions. . . . . If the act were limited in its scope to manufactories which are of public necessity, as gristmills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact—in other words, that it should contain provisions entitling the public to accommodations. A flouring-mill in this state may grind exclusively the wheat of Wisconsin and sell the product exclusively in Europe, and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbors to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. . . . . The statute appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own, and it therefore seems perfectly manifest that when a public use is spoken of in this statute, nothing further is intended than that the use shall be one that in the opinion of the commission or jury will in some manner advance the public interest. But, incidentally, every lawful business does this. Undoubtedly, there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial."

This reasoning is peculiarly applicable to our statute and this case. The Michigan statute was in that decision held unconstitutional and the proceeding dismissed. To the same effect are Loughbridge v. Harris, 42 Ga. 500, [587] Tyler v. Beecher, 44 Vt. 648, 8 Am. Rep. 398, Sauler v. Langham, 34 Ala. 311, and McCulley v. Cunningham, 96 Ala. 583, 11 South. 694.

In Harding v. Goodlet, 3 Yerg. (11 Tenn.) 41, 24 Am. Dec. 546, the petitioners sought to condemn land for a gristmill, sawmill and paper-mill under a statute of that state giving the right of eminent domain to one desiring to erect a water gristmill. The supreme court sustained the statute on the ground that a gristmill is a public mill and the miller a public servant under the statutes of Tennessee, but denied the petition, and in its opinion used the following language: "The petitioners say they are desirous to build a gristmill, sawmill and paper-mill. . . . . The sawmill and paper-mill have no

public character. The erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional. The act of 1777, chapter 23, contemplates no such violation of the rights of one man for the private benefit of another. Had the application been confined to the sawmill and paper-mill, no one could for a moment hesitate in rejecting it. Does the introduction of the gristmill, thereby asking the land for these complicated purposes, alter the case? In my opinion, the application is entitled to no more favor than if nothing were said about the gristmill. If an application of this sort were granted, a like application for the erection of iron works, or any other establishment requiring water power, might be made and would be entitled to equal favor, provided the applicant, as a pretext, were to associate a gristmill with his other works. Thus the gristmill, the only thing mentioned in the act of assembly as having any claim to be of a public character, would be made the subterfuge for vesting in one citizen the land of another, and of giving to the whole establishment, of which it would be but an inconsiderable appendage, the high appellation of a public mill. This would be mocking the citizen, who would thus be despoiled of his land to enrich another. It would be ~~see~~ holding out the idea that his land was taken for a public use and that the public exigencies required it, when, in fact, this was only used as a pretext for obtaining the land for private emolument."

We are clearly of the opinion that, in so far as the statute of 1872 attempts to authorize the condemnation of private property for the purposes of public mills or machinery other than public gristmills, it is violative of that provision of our constitution which declares that private property shall not be taken or damaged for public use without just compensation, the meaning of which is, that private property shall be taken for no other than a public use, and then only upon the payment of just compensation, and that on that ground alone the circuit court would have been justified in sustaining the motion to dismiss appellant's petition. Without reference, therefore, to other questions raised and discussed in the argument of counsel, the order and judgment of the circuit court of Will county will be affirmed.

Whether that is a Public Use **for which private property is authorized to be taken depends upon the object aimed at and whether the**

plan has such an obvious or recognized character of public utility as to justify the exercise of the right of eminent domain or taxation in its favor: Matter of Tuthill, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303. As to whether the question is a legislative or a judicial one, see the monographic note to Chicago etc. Ry. Co. v. Morehouse, 88 Am. St. Rep. 926-946. And as to whether private property can be condemned for mills and manufactories, see the monographic note to Beekman v. Railroad Co., 22 Am. Dec. 699-703.

PEOPLE v. PEOPLE'S GASLIGHT AND COKE CO.

[205 Ill. 482, 68 N. E. 950.]

QUO WARRANTO.—Granting Leave to File an information in quo warranto rests in the sound discretion of the court, and, unless that is abused, the judgment of the court below must stand. (p. 248.)

QUO WARRANTO will not Lie for the enforcement of mere private rights, and can only be resorted to for the vindication of the public interest. (p. 246.)

CONSTITUTIONAL LAW.—Quo Warranto will lie to determine whether a statute, under which a corporation is alleged to usurp power, is constitutional. (p. 247.)

CONSTITUTIONAL LAW—Title of Act.—The general purpose of a constitutional provision that no act shall embrace more than one subject which shall be expressed in its title is accomplished when such title is comprehensive enough to reasonably include, as falling within that general subject and as subordinate branches thereof, the several objects which the act assumes to affect. (p. 248.)

CONSTITUTIONAL LAW—Title of Act.—The generality of the subject embraced in the title to an act is no constitutional objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific, and it is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which may be embraced in it. (p. 248.)

CONSTITUTIONAL LAW—Title of Act.—The generality of the title of an act is no constitutional objection to it, so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. (p. 249.)

CORPORATIONS—Merger of by Legislative Authority.—In the absence of constitutional limitation the legislature has full power to authorize the consolidation of private corporations organized under the law of the state. (p. 250.)

CONSTITUTIONAL LAW—Special Legislation.—A statute authorizing the merger or consolidation of all gas companies doing business in the same city is not unconstitutional as being special or local legislation. (p. 252.)

CONSTITUTIONAL LAW.—Every Presumption must be indulged in favor of the validity of a statute, and it can be held unconstitutional only after resolving and rejecting every reasonable doubt in favor of its validity. (p. 253.)

C. S. Deneen, state's attorney, A. C. Barnes, A. Moses, C. S. Darrow, W. Thompson and A. M. Cross, for the plaintiff in error.

Sears, Meagher & Whitney and J. F. Meagher, for the defendant in error.

486 WILKIN, J. Prior to August 9, 1901, plaintiff in error presented a petition to the circuit court of Cook county for leave to file an information in the nature of quo warranto against defendant in error, which was on that day allowed and the information filed, but with the understanding on the part of the court and counsel for the respective parties that the respondent should have the right thereafter to ask that the order be set aside. On the 17th of the same month a motion to that effect was duly made, and after some delay, the occasion of which is unimportant, submitted to Judge Hanecy on the petition and affidavits presented pro and con. On January 25, 1902, the motion was allowed and the order of August 9th vacated, leave to file the information denied and the petition dismissed. To reverse that ruling this writ of error is prosecuted.

Counsel agree that leave to file an information in quo warranto rests in the sound discretion of the court, and it is admitted by plaintiff in error that this case is to be considered as though the petition had originally been presented to Judge Hanecy at the time he denied the leave to file the information. It was proper practice, upon the presentation of the petition and the appearance of the respondent, to hear affidavits and counter-affidavits as to the facts relied upon for the leave asked, and unless we can say the court below, upon a consideration of the case so presented, abused its legal discretion, the judgment must be affirmed.

The petition shows that the respondent obtained a franchise from the state of Illinois by an act of the legislature approved February 12, 1855, amended February 7, 1865, under which, by authority of an ordinance of the city of Chicago, it purchased real estate and erected gas works, etc., for the purpose of supplying gas to the city and its inhabitants, and was engaged in so doing in the month of August, 1897, when, contrary to law, in addition to its own franchise, it began to use and usurp, and

[487] continues to use and usurp, without any legal warrant whatsoever, certain franchises and privileges, to the prejudice of the people of the state of Illinois. It then proceeds to aver the consolidation or merger of eight other gas companies furnishing light to the inhabitants of the city of Chicago with the respondent, and concludes with the averment that it "is now using and usurping the several above-named franchises and privileges, and has so used the same since and after the third day of August, 1897, in said county of Cook, and still usurps and uses the same, to the great damage and prejudice of the said people of the state of Illinois and against the peace and dignity of the same."

The affidavits filed on behalf of the respondent tended to show that the object of the proceeding was to subserve the purpose of private individuals, and in resisting the leave to file the information it relied upon the well-understood rule of law that quo warranto will not lie for the enforcement of mere private rights, but can only be resorted to for the vindication of the public interest. The counter-affidavits, though not denying many of the facts set forth in those filed on behalf of the respondent, relied mainly upon the sworn statement of the state's attorney to the effect that after a full and careful consideration of the whole matter he reached the conclusion that the act under which the defendant had consolidated with other gas companies was unconstitutional and void, and that he instituted the proceeding influenced by no other consideration than the protection of what he understood to be the public interest. Comment upon the conduct of parties who seem to have been interested in bringing about the filing of the petition is, in our view of the case, unnecessary, the affidavit of the public officer satisfactorily showing that he acted from a sense of official duty, uninfluenced by private interests or motives: People v. North Chicago Ry. Co., 88 Ill. 537; McGahan v. People, 191 Ill. 493, 61 N. E. 418. It is not, however, clear [488] from the petition, when considered in the light of the statute authorizing the consolidation and merger of gas companies, that the public would in any way be benefited by the judgment of ouster here sought, and it seems that the order of the court below, denying leave to file the information and dismissing the petition, was largely upon that ground. Inasmuch, however, as the petition is based solely upon the theory that the statute "in relation to gas companies," approved June 5, 1897, is unconstitutional and void, in view of our conclusion upon that subject it will be unnecessary to consider other questions raised in the argument. The

position of counsel for defendant in error that quo warranto cannot be resorted to for the purpose of determining whether a law is constitutional is not tenable. Section 1 of chapter 112 of our statutes (3 Starr & Curtis' Annotated Statutes, p. 3180), authorizes the bringing of the action in cases of this kind.

The statute is entitled "An act in relation to gas companies": Hurd's Stats. 1901, p. 495. Section 1 authorizes gas companies organized in this state "to sell, transfer and convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, town or village, and such other gas company is authorized to purchase or lease and to hold and enjoy said property." The second section (the one under which the respondent is charged with usurping the franchises of other companies) is as follows: "It shall be lawful for any gas companies now organized or hereafter to be organized in this state, doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, by complying with the provisions of this act, as hereinafter specified." Section 3 authorizes all gas companies "to manufacture and distribute gas for fuel purposes and to distribute natural gas," etc. Sections 4, 5, 6, 7, 8, 9 and 10 pertain to the [489] manner of perfecting the sale or consolidation of companies, and the effect thereof. Section 11 is: "Any corporation purchasing or leasing the property of any company or companies, or into which any company or companies are consolidated and merged under this act, shall be, at the time of availing itself of or accepting the benefits of this act, in the actual business of furnishing gas to consumers; and shall be subject to the following provisions: Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease, or such consolidation and merger. Such corporation shall furnish gas to consumers as good in quality as it furnished previous to such purchase or lease, or such consolidation and merger." Section 12 provides for the infliction of penalties for the violation of the preceding section, and the recovery of damages by any person injured thereby, etc.

The contention of counsel for plaintiff in error against the validity of the law is, first, it contravenes section 13 of article 4 of the constitution of 1870, and it is said: "The title of this act is 'An act in relation to gas companies.' The whole body

of the act relates to the consolidation of gas companies and the sale or lease by one of its property and franchises to another. The subject of 'consolidation,' which freights most of its provisions, is not expressed in the title. The absence of such reference is fatal to the act." If by the expression, "which freights most of its provisions," it is meant that the subject of consolidation is the principal object of the statute, the assertion is unwarranted by its language and provisions. The enactment in the first section, not questioned in the argument, is no less fully provided for in the subsequent provisions of the act than is the "consolidation and merger" authorized by the second. The contention is, that authority for any gas companies now organized or hereafter to be organized in this state, [490] doing business in the same city, town or village, to consolidate and merge into a single corporation, which shall be one of said merging and consolidating corporations, is not consistent with or germane to the general subject "in relation to gas companies."

The validity of statutes under the foregoing section of the present constitution, and a similar one as to special or local statutes in that of 1848, has frequently been before us, and we have uniformly held that "the general purpose of the provision is accomplished when the title is comprehensive enough to reasonably include as falling within that general subject, and as subordinate branches thereof, the several objects which the statute assumes to effect": Potwin v. Johnson, 108 Ill. 70; that "the fact that many things of a diverse nature are authorized or required to be done is unimportant, provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment": Blake v. People, 109 Ill. 504; and that "the generality of the subject embraced in the title is no objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific; and it is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which will be embraced within it": People v. Nelson, 133 Ill. 565, 27 N. E. 217. "If all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with the subject indicated and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject matter so indicated without the title being a mere index of everything contained therein. The provision of the constitution cannot be so narrowly construed as to require the title of an act, of itself, to

contain the entire act": Park v. Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932; or, stated in other language: "It is not to be expected, neither is it possible, for the title of the [491] act to contain all the various provisions of the act itself. . . . . If such was the case, the title to the act would have to be as comprehensive as the act itself. Such was not the object or intent of the constitution": Burke v. Monroe County, 77 Ill. 610. "Judge Cooley, in his work on Constitutional Limitations, 172, dealing with this subject says: 'The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible'": Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. We again said in Allardt v. People, 197 Ill. 501, 64 N. E. 533: "The framers of the constitution intended by it to prevent legislation which should not by the title clearly inform the legislature of its purpose and prevent the people from being misled thereby. 'The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection'": Citing Cooley on Constitutional Limitations, sec. 169 et seq., and People v. Institution of Protestant Deaconesses, 71 Ill. 229.

The many cases referred to as supporting the contention of plaintiff in error, most of which are found in our own reports, all recognize and enforce the same construction announced in the foregoing decisions. Those of them which hold statutes unconstitutional for a failure to conform to section 13, supra, of the constitution, do so because the enactments were incongruous, not germane to the subject expressed in the title, or that the title furnished no information to the members of the legislature or the public of their purpose. New York etc. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088, is cited in the brief of counsel for plaintiff in error in support of the foregoing objection, with the comment "squarely in [492] point." This must have been by inadvertence. The case has no bearing whatever upon the question involved. It neither deals with nor discusses it. The only constitutional question there decided was, that parts of a statute conceded to be unconstitutional did not invalidate the whole act.

We have been unable to find any authority for the position that the consolidation and merger of gas companies authorized by section 2 are in any way inconsistent with or foreign to the title of the foregoing statute relating to gas companies, nor are we able to perceive any good reason for such a conclusion. There can be no doubt that in the absence of constitutional limitation the legislature has full power to authorize the consolidation of all private corporations organized under the laws of the state: 1 Beach on Private Corporations, sec. 332. The only restriction in our constitution upon that power is the provision found in section 11 of article 11, which prohibits railroad corporations from consolidating with any other railroad corporation owning a parallel or competing line. Many of the state constitutions contain provisions similar to section 11, supra, of our own, and some states have by their constitutions prohibited all combinations of corporations to prevent competition (6 Am. & Eng. Ency. of Law, 2d ed., 825), but, as above stated, our constitution contains no such prohibition.

"The legislative power may be exercised by grant in the charters of consolidating companies, or by the provisions of a general or special act of the legislature passed prior to consolidation and after the organization of the original corporations": 1 Beach on Private Corporations, sec. 334. In section 326 of the same work the following definition of consolidation is given: "The word 'consolidation' is used to denote any conjunction or union of the stock, property or franchises of two or more corporations, whereby the conduct of their affairs is permanently or for a long period of time placed under one [493] management, whether the agreement between them be by lease, sale or other form of contract, and whether its effect be the dissolution of neither of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new." Statutes "authorizing the consolidation of 'manufacturing' corporations have been held to include electric light companies, and also, undoubtedly, include gas companies." "Acts of several of the states also authorize the consolidation of corporations of the same nature and covering the same territory. Such an act has been held to include gas companies and water companies, organized to furnish water for the same village": 6 Am. & Eng. Ency. of Law, 803, and cases cited.

The frequency with which corporations are consolidated, by sale, lease or other form of contract, and the fact that many of the states have adopted general statutes authorizing the consolidation and merger of corporations, repel the idea that such consolidation and merger are foreign to the general subject "in relation to corporations" and not reasonably included therein, or, when applied to this act, the subject "consolidation and merger" is not germane to the title "in relation to gas companies." We entertain no doubt that the enactment authorizing the consolidation of gas companies is, under the repeated decisions of this court, embraced in the title of this act, within the meaning of section 13 of article 4 of the constitution of 1870.

The second ground upon which the act is condemned is, that it violates section 22 of article 4, which prohibits the passage by the general assembly of any local or special laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Soon after the adoption of [494] the present constitution, in passing upon the validity of a provision in the act in force July 1, 1872, known as "the mayors' bill," we said: "The act is neither local nor special. It applies in general terms to all the cities in the state. Whether there may be many or few to whom its provisions will be of any practical force is not the question. As was observed in McAunich v. Mississippi etc. R. R. Co., 20 Iowa, 338: 'These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation'": People v. Wright, 70 Ill. 388. To the same effect is Potwin v. Johnson, 108 Ill. 70.' In Hawthorn v. People, 109 Ill. 302, 311, 50 Am. Rep. 610, the validity of the act of June 18, 1883, in relation to butter and cheese factories, was challenged, for the reason, among others, that it was special or class legislation, but we again said: "We fail to perceive that this is not a general law. It embraces all persons in the state similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. . . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they oc-

cupy the position of those who are embraced": See, also, People v. Hazelwood, 116 Ill. 319, 6 N. E. 480; Cummings v. City of Chicago, 144 Ill. 563, 33 N. E. 854; Park v. Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932. The act under consideration applies to all gas companies organized or to be organized in this state, doing business in the same city, etc., and is, therefore, in no proper sense special or local legislation.

Again, it is said the respondent, "as a result of the act in question, would acquire to itself the franchise of eight [495] other corporations organized under general laws. The company's charter would thus be extended or amended so as to confer upon said company the right to merge with other gas companies or the right of having them merged into itself, and this not by general law relating to all corporations, but by this special law relating only to gas companies. This distinctly contravenes section 1 of article 11, that 'no corporation shall be created by special laws, or its charter extended, changed or amended, ... but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.'" The entire argument in support of this proposition rests upon the assertion that "as a result of this act the respondent would acquire to itself the franchise of eight other corporations organized under general laws." If the proposition was otherwise sound, it cannot be sustained under the facts of this case. The petition fails to show in what way or manner the respondent is exercising any of the rights or privileges granted to either of the other companies, or that it is using other rights and privileges than those authorized by its own charter. Although the general rule is that the consolidation of several corporations into a new one invests the latter with all the rights and privileges of the several constituent companies, such is not the result of consolidation or merger under this statute. Section 2 expressly provides that the consolidation and merger into a single corporation must be into one of the merging and consolidating corporations, which by section 11 shall be, at the time of availing itself of or accepting the benefits of the act, in the actual business of furnishing gas to consumers. By the last clause of section 8 it is provided: "The companies, parties to the agreement or agreements, which provide for consolidation and merger, shall thereupon be and are hereby declared to be consolidated and merged into the one corporation specified in such agreement or agreements." While section 9 makes the consolidated [496] corporation subject to, and requires

it to perform for each of the companies so entering into said agreement or agreements, the legal obligations resting upon each of them, respectively, under their respective charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct, it does not confer upon it any enlarged powers or privileges. Moreover, there is nothing whatever in the petition to show that the rights, privileges and franchises of any or either of the consolidated or merged companies are larger or in any way different from those of the respondent.

We are of the opinion that none of the objections urged to the constitutionality of the statute can be sustained. It is scarcely necessary in this case to call attention to or place reliance upon the well-understood rule that every presumption must be indulged in favor of the validity of enactments by the legislative branch of the government, and that statutes will only be held unconstitutional and void after resolving every reasonable doubt in favor of their validity. It is said: "If this act is sustained, its necessary and only possible operation will be to promote and create a monopoly. The attempted consolidation under it has resulted in a gas trust." If a monopoly has been created or a gas trust formed by the consolidation of the defendant in error with the other corporations named in the petition, it does not so appear in this proceeding; nor are we able to see how such a result can follow in view of the requirements of section 11 of the act and the penalties imposed by section 12. Whether the city council of the city of Chicago has power to regulate the price which the respondent company may charge for gas furnished to it and its inhabitants or not, there is nothing in this case to show that extortion is being practiced or a monopoly created by it. It will be time enough to meet those questions when a case is presented involving them.

497 There was no abuse of legal discretion in denying the leave to file the information and dismissing the petition. The judgment of the circuit court will accordingly be affirmed.

Mr. Justice Magruder, dissenting.

A *Writ of Quo Warranto*, in public matters, is a writ of right at the suit of the state, and issues as a matter of course upon demand of the proper officer; but where the information is filed at the relation of an individual to enforce private as distinguished from public rights, the issuance of the writ rests in the discretion of the court: Note to McPhal v. People, 52 Am. St. Rep. 312, 313.

The Title of Statutes, with reference to the requirements of the constitution, are discussed in the monographic notes to Bobel v. People, 64 Am. St. Rep. 70-107; Crookston v. County Commissioners, 79 Am. St. Rep. 456-486; Lewis v. Dunne, 86 Am. St. Rep. 267-279. The constitutional restrictions are construed liberally: Power v. Kitching, 10 N. Dak. 254, 88 Am. St. Rep. 691, 86 N. W. 737. And the mode of expressing the title rests in the discretion of the legislature: Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 91 Am. St. Rep. 898, 89 N. W. 880. Generality of title is not fatal nor objectionable: Mobile Transportation etc. Co. v. Mobile, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645; Power v. Kitching, 10 N. Dak. 254, 88 Am. St. Rep. 691, 86 N. W. 737.

HORWICH v. WALKER-GORDON LABORATORY CO.

[205 Ill. 497, 68 N. E. 938.]

CONSTITUTIONAL LAW—Police Power.—To sustain a statute as referable to the police power, it must appear that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. (p. 257.)

CONSTITUTIONAL LAW—Statute Making Innocent Act Criminal.—The legislature cannot, under cover of the police power, make the purchase unlawful of a receptacle, bearing a registered trademark, without the written consent of the owner. The legislature cannot pronounce the performance of an innocent act criminal, when the exercise of the police power is not involved. (p. 258.)

CONSTITUTIONAL LAW—Trademark Act.—A statute making the purchase of a certain receptacle bearing a registered trademark, without the consent of the owner, unlawful, is unconstitutional and void as granting to the owner of a specific class of personal property, rights and privileges not possessed by owners of other personalty. (p. 260.)

CONSTITUTIONAL LAW.—Class Legislation is not unconstitutional, provided the class is composed of individuals possessing in common some disability, attribute, or qualification, or in some condition marking them as proper objects for legislation. (pp. 260, 261.)

CONSTITUTIONAL LAW — Discrimination — Evidence.—A statute making the possession of a certain class of dealers of receptacles having registered trademarks prima facie evidence that such possession is unlawful, is unconstitutional and void as making an unwarranted distinction between such dealers and other dealers or persons, and as rendering it possible to convict them upon evidence, upon which others could not be lawfully convicted. (p. 261.)

E. S. Cummings and Walker & Payne, for the defendants in error.

E. N. Zoline and H. R. Platt, for the plaintiffs in error.

[501] SCOTT, J. Plaintiffs in error contend that the statute under which this proceeding is brought is unconstitutional, and in the view taken by this court it is unnecessary to determine any other question.

The first section of the act provides that the owners of cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels or containers, with his, her, its or their names, brands, designs, trademarks, devices or other marks of ownership stamped, impressed, labeled, blown in or otherwise marked thereon, may register such names, brands, designs, trademarks, devices or other marks of ownership, by filing a verified statement, containing a description thereof, with the Secretary of State and with the clerk of the proper county. Said section also provides for the publication of such statement, and for the filing of certificates of publication with the Secretary of State and county clerk. Certified copies of such statement are made prima facie evidence [502] of the title of the owner or owners named therein to the property upon which the name or other mark of ownership may appear, as the same is described in such copy. The second and third sections of the act read as follows, to wit:

"Sec. 2. It is hereby declared to be unlawful for any person or persons or corporation, without the written consent of the owner or owners thereof, to hereafter keep for sale any can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel or container so marked or distinguished as aforesaid, of which a description shall have been filed and published as provided in section 1 of this act, or to use or fill with any substance, commodity or product for the sale therein of such substance, commodity or product, any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel, or container, or to wantonly break or destroy or to buy, sell or dispose of or traffic in any such can, tub, firkin, bottle, box, cask, barrel, keg, carton, tank, fountain, vessel, or container, or to deface, erase, obliterate, cover up or otherwise remove or conceal any such name, brand, design, trademark, device or other mark thereon, for the purpose of destroying or removing the evidence of the ownership of such article.

"Sec. 3. The using by any person or persons or corporation other than the owner or owners thereof, or his, her, its or their agent, of any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel, or container, for the sale therein of any substance, commodity or product, other than that

originally therein contained, or the buying, selling, or trafficking in any such can, tub, firkin, box, bottle, cask, barrel, keg, carton, tank, fountain, vessel or container, or the fact that any junk dealer or dealer in cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels, or containers, shall have in his or her possession any such can, tub, firkin, box, bottle, cask, barrel, keg, [503] carton, tank, fountain, vessel, or container, so marked or stamped, and a description of which shall have been filed and published as provided in section 1 of this act, shall be and it hereby is declared to be prima facie evidence that such using, buying, selling, or trafficking in or possession of is unlawful within the meaning of this act."

The fourth section fixes a penalty, recoverable at the suit of the people of the state of Illinois by summons, for the violation of any of the provisions of the act. The fifth section provides for the issuance of a search-warrant upon the filing of a proper affidavit, and the sixth section, under which this proceeding is brought, provides, in substance, that any person may be enjoined from violating the second section of the act.

A somewhat similar statute was passed in 1873 (Rev. Stats. 1874, p. 1084), and that statute was held by this court to be unconstitutional in Lippman v. People, 175 Ill. 101, 51 N. E. 872. The act of 1901 seems, from an examination thereof, to have been passed by the legislature with a view to obviate the constitutional objections to the earlier act but for the purpose of accomplishing the same results as were sought by the law of 1873.

It is argued by counsel for defendant in error that the purpose of the present act is to protect the public and manufacturers of food products from frauds and imitations and to prevent the public from being deceived in the use of adulterated foods. Neither the title nor the language of the act shows evidence of any such purpose. The law is entirely silent in regard to the quality of the commodity that may be sold in the receptacles by the owner or by the person to whom the owner may have given his written consent to use or buy the receptacle. There is no provision that the person who has purchased one of these receptacles with the written consent of the owner shall only put therein food products of as high a standard as those manufactured by the original owner of the receptacle (by which term we designate the owner [504] whose registered mark of ownership appears on the receptacle), or that the food placed therein shall be of any particular standard of purity. If, indeed, it was

the purpose of the legislature by this statute to protect the public in the purchase of food, the legislature, instead of exercising the power itself, has delegated to the persons throughout the state who may see fit to register their names or other marks of ownership, as provided by the statute, the power to determine what is deleterious to the health of the public and what may or may not be sold in these receptacles after they have passed from the hands of the original owners, or such original owners may sell these receptacles or grant their use to others without any limitations whatever in regard to what shall thereafter be placed or sold therein.

We have examined this statute in vain for the purpose of finding any evidence that it was intended by the legislature to apply particularly to food products. The only thing that could possibly be construed as any evidence on that score is the fact that it describes receptacles in which food might be sold; but it will be observed that in the list of these receptacles, cans, boxes, kegs and barrels are included in which gunpowder, boots and shoes, nails, lime, and an innumerable number of other articles of merchandise, are habitually inclosed and sold. A patient consideration of the provisions of this statute leads us to the conclusion that its purpose, like that of the earlier statute, was to facilitate the recovery of certain kinds of personal property, to wit, the receptacles described in the first section of this statute, which have passed from the possession of the owners thereof to others and which the owners desire to recover summarily. The act is wholly for the benefit of the owners of personal property of this class, and is designed to give to the owners of personal property of this class rights and privileges not possessed by the owners of other classes of personal property.

505 It is argued that this law should be sustained under the police power of the state. It has been frequently said by this court that where a statute is referable to that power, it must appear that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare: Toledo etc. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Eden v. People, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108; City of Chicago v. Netcher, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707; Noel v. People, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616. It cannot be contended that the selling or using of any of these receptacles in the manner prohibited by this statute, viz., without the written consent of the owner, is in any manner more injurious to the

public health, morals, safety or welfare than if the same things be done with the written consent of the owner. The written consent of the owner is no guaranty to the public that any wrong which it is in the power of the purchaser, possessor or user of the receptacles in question to do to the public will not be done.

Under the second section it is unlawful to purchase from the owner thereof one of these receptacles bearing the registered mark without first or at the same time obtaining the written consent of the owner to make the purchase. It might, perhaps, be argued that such was not the legislative intent, but that the provision requiring the written consent was only intended to apply where the receptacle was purchased from some person other than the original owner thereof, and then was meant to require the written consent of such original owner; but it seems quite certain from an inspection of this enactment that the legislative purpose was to place the possessor of these receptacles in a position where he could not testify to a verbal consent given by the owner from whom he purchased, and thereby establish a defense, the purpose being to so fully protect the original owner whose registered marks of ownership appeared on the article, that he should have to meet no evidence except [506] evidence written by himself, if an issue upon the question of his consent arose.

In view of the fact that this statute does not come within the police power of the state, it is beyond the power of the legislature to make unlawful the purchase of one of these receptacles without the written consent of the owner from whom it was purchased. As was said by this court in Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, the legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort or welfare is not interfered with.

An attempt is made to justify the prohibition of these acts without the consent of the owner by reference to the statute making it an offense for the mortgagor of chattels to sell the same without the written consent of the mortgagee. But in considering that argument the objects of the two statutes should be compared. The purpose of the statute requiring the written consent of the mortgagee was to prevent property in which he had an interest from being so disposed of that he would be hindered in enforcing his debt. That was intended as a protection to his property rights, while a provision that he who

purchases from the mortgagor (or, as in this case, from the owner of the receptacle) is guilty of a misdemeanor unless he has the written consent of the seller to make the purchase, is in nowise a protection to the property rights of the seller. The chattel mortgage statute is for the protection of the mortgagee, who is not a party to the sale and cannot protect himself. This statute is for the benefit of the owner, who is the seller, and who, being at no disadvantage and under no disability, needs no protection.

In Tiedeman on Limitations of Police Power, page 208, in discussing police regulations established for detecting and preventing fraud, it is said: "Laws which provide for the inspection and grading of flour . . . . are constitutional exercises of police power, so far as they [307] permit one party to compel the other to comply with the regulation, in the absence of their agreement to the contrary. For example, it is permissible for a statutory regulation to provide for standard weights and measures and to compel their use when the parties have not agreed upon the use of others, but it cannot be reasonable to prohibit the use of any other mode of measurement. It is an excessive exercise of police power when the law compels one to make use of the means provided for his own protection against fraud." There is no reason which can set the legislative police power of the state in motion for placing in a statute a provision that the seller or bailor must give to the buyer or bailee his written consent to buy or use an article of personal property sold or bailed. The manner in which the acquiescence of the seller or bailor in such a transaction shall be evidenced is wholly for the parties themselves.

There is no distinction in this act between receptacles of the class specified in the law which were in existence when the act became effective and such receptacles thereafter made or manufactured—that is, by the terms of the law a receptacle then in existence bearing one of the marks of ownership specified in the law, which mark should thereafter be registered, would, together with the person then in possession thereof, whether the original owner or another, upon the registering of the mark become subject to the operation of this law, and in this case it is sought to make this law apply to bottles, some of which may have been manufactured with the mark blown in them before the passage of the law and long before the mark was registered. In the judgment of the court this law granted to all persons who at the time of its passage owned receptacles of the specified

kinds, whether in or out of the possession of the owner, bearing marks of ownership of the nature denominated in the statute, who afterward registered those marks of ownership, and to all persons who thereafter registered such [508] marks of ownership and placed them upon any such receptacles acquired after the passage of the law, special and exclusive privileges, in that it vested them with rights for the recovery of personal property not enjoyed in common by all the owners of personal property in the state of Illinois. The language of this statute is much broader than that of the act of 1873, but it is still legislation in favor of a portion of the community only, namely, the portion that are the owners of receptacles named in the first section of the act. It is legislation in favor of the owners of personal property of a certain kind. There is no reason why the owners of personal property of the character named in this statute should be distinguished from or placed in a class apart from the owners of other personal property in this state.

In Lippman v. People, 175 Ill. 101, 51 N. E. 872, this court emphasized the fact that in Eden v. People, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108, in passing upon the validity of the act requiring barber-shops to be closed on Sunday, the distinction was pointed out that where legislation concerns laborers, and there is no reasonable ground of distinction or division into classes, the general class includes all laborers, and as barbers were only a branch of that class the law was not general. So here, this legislation concerns the owners of personal property. It attempts to legislate for the benefit only of the owners of such personal property as is named in this act, and is therefore legislation conferring special rights and privileges upon a portion, only, of the owners of personal property. There is no reason that suggests itself to our minds, and none has been suggested by counsel, why such owners should be entitled to this special protection or why they should be considered a class by themselves, so that legislation for their benefit alone would not be obnoxious to the constitution. This act fails to meet the reasoning of this court as found in Lippman v. People, 175 Ill. 101, 51 N. E. 872, in this regard.

Legislation in favor of a class is not prohibited, but the class must be composed of individuals possessing in [509] common some disability, attribute or qualification, or in some condition marking them as proper objects for legislative favor, as debtors and wage-earners who are heads of families residing with the same, who have been given by our laws more liberal ex-

emptions than are given to persons upon whom none are dependent. The conditions that make such wage-earners and debtors the proper and lawful beneficiaries of legislation of this character readily occur to everyone, and they are conditions which put such persons in classes easily distinguishable from the remainder of the community. No such reason can be found for considering persons owning receptacles of the character specified in this act as a class by themselves and singling them out as objects of special consideration at the hands of the law maker. They stand on the same footing as other owners of personal property, and any law favoring them above others, for the reason alone that they own personal property of the kind specified in this act, is a special law, within the meaning of our constitution.

The third section of the act provides, among other things, that "the fact that any junk dealer or dealer in cans, tubs, firkins, boxes, bottles, casks, barrels, kegs, cartons, tanks, fountains, vessels, or containers, shall have in his or her possession" any such receptacles bearing a registered mark, shall be prima facie evidence that such possession is unlawful, within the meaning of this act. Such possession by others is given no such effect by this statute. Dealers of the kind mentioned in the quoted language are merchants. An empty pasteboard shoe-box found in the residence of one whose business is the manufacture and sale of tubs, casks, kegs and barrels, bearing a registered mark, would be prima facie evidence that he had violated this law, and if he were unable to explain his possession would warrant his conviction, while if the same box bearing the same mark were found in the residence of his next-door neighbor [510] who is a grocer, it would be no evidence at all of any violation of this statute. This is an unlawful discrimination against persons dealing in receptacles of the specified class and confers a special privilege or immunity upon all other persons. It makes that evidence against one which is not evidence against another. The legislature is without power to make any such arbitrary distinction. In the case of Mathews v. People, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28, the following language from Cooley on Constitutional Limitations is quoted with approval (p. 402): "A statute would not be constitutional . . . . which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . . Everyone

has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." The same doctrine is announced in Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, Harding v. People, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, and Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. We therefore conclude that in making it possible to convict junk dealers, and dealers in receptacles of the class mentioned in the statute, on evidence that would not warrant the conviction of other persons, the legislature has made an unwarranted and unconstitutional distinction between such dealers and other persons.

Defendant in error relies upon the case of People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, as an authority for upholding the validity of this statute. In that case the validity of a New York statute entitled, "An act to protect the owners of bottles, boxes, syphons and kegs used in the sale of soda waters, minerals and aerated waters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, [511] weiss beer, beer, white beer, or other beverages," was considered by the court. That statute is materially different from the statute we have under consideration, but it is sufficient to say that in that case so relied upon by defendant in error the points that the statute there under consideration granted any special or exclusive privileges or immunities, and that such statute was invalid because it made unjust discriminations between members of the same class in the community, were neither made nor considered.

The statute in question in the case under consideration here is in contravention of section 22 of article 4 of our constitution of 1870. The decree of the superior court of Cook county will therefore be reversed and this cause will be remanded to that court, with directions to dismiss the bill for want of equity.

The Power of the Legislature to declare acts criminal is discussed in the monographic note to Booth v. People, 78 Am. St. Rep. 235-274; and the subsequent cases of Jannin v. State, 42 Tex. Cr. Rep. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821, and note; Ex parte Lorenzen, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68. It is said that the legislature can make any act a crime, whether or not it involves moral turpitude: State v. Heldenbrand, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25. Compare Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007.

The Police Power can be resorted to for the purpose of preserving the public health, safety, or morals, but it cannot be put forward as an excuse for oppressive and unjust legislation: State v. Broadbelt, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771; Booth v. People, 186 Ill. 43, 78 Am. St. Rep. 229, 57 N. E. 789; Harbison v. Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955. The test of police regulations, when they are called in question, is whether they have some relation to the public health or welfare, and whether such is, in fact, the end sought to be attained: Iler v. Ross, 64 Neb. 710, 97 Am. St. Rep. 676, 90 N. W. 869.

Statutes Applicable to all Members of a Class are not invalid because limited to that class, if the acts declared unlawful are peculiar to it: State v. Justus, 85 Minn. 279, 89 Am. St. Rep. 550, 88 N. W. 759; State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737.

CASES

IN THE

SUPREME COURT OF JUDICATURE

OF

INDIANA.

LAKE COUNTY WATER AND LIGHT COMPANY v. WALSH.

[160 Ind. 32, 65 N. E. 530.]

MUNICIPAL CORPORATIONS, Power of—Construction of Laws Granting.—A doubtful claim of power or any doubt or ambiguity in the terms used by the legislature is resolved against the corporation. (p. 268.)

MUNICIPAL CORPORATIONS—Power of to Sell Lands Held for a Public Purpose.—A statute declaring that any city owning real estate shall have power to sell and convey the same as the city council may deem expedient relates only to real property held for private purposes. (p. 269.)

A MUNICIPAL CORPORATION has no Implied Authority to Dispose of Lands which have been conveyed to it for a public use. (p. 271.)

MUNICIPAL CORPORATIONS—What Property of is Devoted to a Public Use and Therefore not Subject to Transfer.—Waterworks and an Electric Light Plant constructed or purchased by a city and maintained by it for the extinction of fires, for domestic purposes, for lighting streets, and for use in the houses of the inhabitants are to be regarded as devoted to a public use, though rentals are charged and paid for the same. (p. 273.)

Wood & Oakley, V. S. Reiter, Walter Olds and N. D. Doughman, for the appellants.

W. B. Reading, B. M. Cheney and A. F. Knotts, for the appellee.

33 DOWLING, J. This is a proceeding to enjoin the city of East Chicago and William E. Williams, its treasurer, from paying to the appellant certain alleged water rents and charges

for electric lighting; to set aside as fraudulent a deed of conveyance of a waterworks plant and an electric light plant, executed by the city of East Chicago to the Lake County Water and Light Company; and for the appointment of a receiver to take possession of said water and electric light plants, and to operate them pending this litigation.

Issues were formed, and upon the trial the court found for the appellee, the plaintiff below, and, over a motion for a new trial, a judgment and decree were entered according to the prayer of the complaint.

The Lake County Water and Light Company appeals, and rests its demand for a reversal of the judgment upon the supposed errors of the trial court in overruling the demurrer to the complaint, and in denying its motion for a new trial.

[34] The complaint states, in substance, that the appellee was and is a property owner and taxpayer of the city of East Chicago, a municipal corporation organized under the general laws of the state of Indiana; that on January 30, 1900, the said city of East Chicago owned a waterworks plant and an electric light plant and system, operating them for the convenience of the inhabitants of the said city, and the protection of their property; that prior to November 3, 1899, the said city had assumed the bonded debt of the East Chicago Light and Power Company, but that on said last-named day it and its treasurer, Williams, had been permanently enjoined from paying said debt; that prior to November 9, 1899, said city had attempted to assume the bonded debt of the East Chicago Waterworks Company, but that on said day said city and its treasurer had been permanently enjoined from paying the same; that afterward, between November 9, 1899, and January 30, 1900, the mayor and common council of said city and the owners and holders of the bonds of the said East Chicago Light and Power Company, whose names were unknown to the appellee, entered into a conspiracy to defraud the taxpayers of said city, of whom the appellee was one, and by indirect means to bring about the payment of the bonded indebtedness of the said water company, and said light and power company; that in furtherance of said scheme, the said conspirators caused the said Lake County Water and Light Company to be organized as a private corporation; that on January 30, 1900, the said city, by its mayor and common council, conveyed the said waterworks plant and electric lighting plant by deed to the said Lake County Water and Light

Company, and put the said grantee in possession of the same; that the said conveyance was by quitclaim deed, and the consideration named therein was sixty thousand dollars; that the property so conveyed included not only the land occupied and used for said plants, but also all the [35] buildings, rights of way, street plants, and other property and appliances of said waterworks and electric light companies, all of which were subject to a bonded indebtedness aggregating sixty thousand dollars; that a pretended appraisement of the said property was made, but that it was irregular and void; that the only consideration for such conveyance was the assumption by the said Lake County Water and Light Company of the said bonded debts of the said water and electric light companies; that, to carry out the design of the said conspirators to subject the said city of East Chicago to the payment of the said bonded debts of the said companies, an ordinance was passed by the mayor and common council of said city granting to said Lake County Water and Light Company a franchise to maintain and operate said waterworks plant for a term of thirty years, and binding said city to pay to the said Lake County Water and Light Company fourteen hundred and eighty dollars per annum, in twelve equal monthly installments, for hydrant rentals for ninety-five hydrants; that an ordinance was also passed by the said mayor and common council granting to the said Lake County Water and Light Company a franchise to maintain and operate said electric light plant for a term of ten years from January 30, 1900, and binding said city to pay to the said Lake County Water and Light Company four thousand eight hundred and forty dollars per annum, in monthly installments, for lights for the public use; that all of said proceedings were part of a subterfuge by which said conspirators sought to evade the injunction before that granted against the said city prohibiting it from paying the said bonded debts of the said East Chicago Waterworks Company and the East Chicago Light and Power Company; that since January 30, 1900, Williams, as city treasurer, has paid out four thousand eight hundred and forty dollars in obedience to the order of the common council of said city of East Chicago, and in furtherance of the said scheme of the said conspirators to pay off the bonded debts of the said [36] East Chicago Light and Power Company and the East Chicago Waterworks Company, and is about to pay the further sum of twelve hundred and sixty dollars to said Lake County Water and Light Company;

and that, unless enjoined, he will continue to pay the sum of twelve hundred and sixty dollars per annum for a term of ten years, and the sum of eight hundred and seventy-three dollars and thirty-three and one-third cents per annum for the further term of twenty years after said term of ten years; that the Lake County Water and Light Company, its officers and agents, threaten, if proceedings are taken against it, to enjoin the payment of said monthly rentals and charges, to shut down the said two plants, and to apply to the circuit court of the United States for the district of Indiana at the city of Indianapolis for the appointment of a receiver; and that the closing of said plants, even for a short time, would cause irreparable damage to said city of East Chicago and its inhabitants; and that the said Lake County Water and Light Company is, and always has been wholly insolvent. Copies of the several ordinances referred to, and of the deed mentioned in the complaint, were filed with and made parts of that pleading. Prayer for a temporary injunction restraining the city of East Chicago, and its treasurer, from paying said rentals and charges, for a judgment setting aside the said deed from the city of East Chicago to the said Lake County Water and Light Company; the appointment of a receiver to take charge of and operate said water and light plants pending this litigation, and that on the final hearing the injunction be made permanent.

It is not alleged that the city of East Chicago is indebted beyond the constitutional limit, or in any amount whatever. There is no averment of the value of the water and electric plants. Neither is there any charge that the rentals agreed to be paid by the city for fire hydrants and for electric lighting are unreasonable, nor that the city could obtain such service for lower prices, nor that it could operate [37] the plants itself, and supply the city with water and light at less cost. The nature and terms of the judgment alleged to have been rendered enjoining the city from assuming the bonded debts of the East Chicago Waterworks Company and the East Chicago Light and Power Company, are not set out. The connection of the East Chicago Waterworks Company and of the East Chicago Light and Power Company with the property alleged to have been owned by the city of East Chicago and conveyed by it to the Lake County Water and Light Company, is not disclosed by the complaint. Nor do we think that the averments of the complaint are sufficient as a charge of fraud against the city, its treasurer, and common council, and

the East Chicago Light and Power Company. The allegations of the complaint are not nearly so full and particular as could have been wished, and, in view of the omissions we have pointed out, the question as to the sufficiency of that pleading is reduced to very narrow limits.

The propositions of law stated by counsel for appellee, by which they seek to sustain the complaint, are these: "1. Under the provisions of the state constitution, a municipal corporation cannot for any purpose, or in any manner, become indebted to an amount exceeding two per cent of the value of its taxable property. 2. The common council of a city cannot sell or transfer property held by it for public uses or governmental purposes. Waterworks and electric light systems belong to this class. 3. Public policy forbids that property held by a municipal corporation for public uses or for governmental purposes shall be sold to satisfy debts of the city." The fourth, fifth, sixth, seventh, eighth, ninth, and eleventh propositions relate to the constitutional limitation of the right of a city to become indebted. "10. Grants by legislature to a corporation, whether public or private, will be strictly construed. . . . . 12. The fact that water rentals are collected [88] by a city from private concerns does not constitute 'engaging in business for gain or profit.'"

The first, fourth, fifth, sixth, seventh, eighth, ninth, and eleventh propositions are wholly unimportant and may be laid out of the case, for the reason, before stated, that the complaint contains no allegations to which they apply. On the other hand, if all of the positions assumed by the appellant should be conceded, still the complaint would be sufficient if a city organized under the general statutes of this state has not, in the absence of special legislative authority, the power to sell property held by it for public uses, and if the waterworks and electric light plant, mentioned in the complaint, were so held by the city of East Chicago.

In determining the question whether cities are authorized to sell and convey property held for public uses or purposes, we must be governed by the rule laid down in Pittsburgh etc. R. R. Co. v. Town of Crown Point, 146 Ind. 421, 422, 45 N. E. 587, as follows: "Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation: Minturn v. Larue, 23 How. (U. S.) 435; Bloom v. Xenia, 32 Ohio St. 461; Ravenna v. Pennsylvania Co., 45 Ohio St. 118, 12 N. E. 445; Cooley's Constitu-

tional Limitations, 233, 234; 1 Dillon on Municipal Corporations, secs. 89-91; Tiedeman on Municipal Corporations, sec. 110."

The statutes bearing upon the question of the power of cities incorporated under the general laws of this state to sell property held by them are the following: Section 3548 declares that any city owning real estate shall have power to sell and convey the same as the common council may deem expedient. Section 3549 provides that such sale must be authorized by a vote of two-thirds of the members of the common council. Section 3550 requires that the real estate to be sold shall first be appraised by three disinterested freeholders of such city, to be appointed by 39 the judge of the circuit court of the county in which such city is situated. Section 3541, clause 45, authorizes the city to purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for a public park, or other public purpose. Section 3541, clause 47, provides that the common council may, upon the petition of a majority of the legal voters of the city, sell any public square or public landing of such city, or part thereof, and convey the same by deed; the moneys arising from such sale to be deposited in the city treasury to be expended in the purchase of any other public square, or public landing, and for the improvement of the same. Section 3550a (Acts 1895, p. 151) gives to the common council of certain small cities the power, by a vote of a majority of its members, to sell and convey to any corporation or body politic any public square, market square, market-place, fractional piece of ground, or public park, owned or held by such city, or within its corporate limits to be held by such corporation or body politic, and devoted to any public purpose: Burns' Rev. Stats. 1901, secs. 3541, 3548-3550, cl. 45, 47, 3550a; Rev. Stats. 1881 (Horner's Rev. Stats. 1901), secs. 3106, 3111-3113.

The first three of the sections above referred to evidently relate to real estate held by the city for private purposes only. None of the other enactments purports to authorize the sale of any property held for public use, except such as is expressly mentioned in their provisions. These statutes clearly indicate that the power of a city to sell property devoted to any public use is restricted, and that, to enable a city to make a sale of such property, special authority must be granted to it by the legislature. Property so held is held upon a trust for the benefit of the inhabitants of the city; and the city as the trustee for

such use cannot, by its unauthorized act, destroy the trust. This principle was recognized by this court in City of Fort Wayne v. Lake Shore etc. R. R. Co., 132 Ind. 558, 563, [40] 32 Am. St. Rep. 277, 32 N. E. 215, although the dictum on that subject was not, perhaps, necessary to the decision of the case. The facts were that the city of Fort Wayne owned in fee, and subject to no conditions, a tract of land contiguous to its corporate limits, which it had purchased with the intention of using as a public park, but which had not yet been dedicated to that purpose. The city granted to a railroad corporation a portion of this tract, on certain conditions, which were supposed to be beneficial to the city. Subsequently the common council passed a resolution attempting to rescind its former proceedings, upon the ground, among others, that the city had no power to bargain away lands purchased for a public park. The action was brought by the successor of the railroad company to which the conveyance of the land had been made to enjoin the city from opening a street across said land, as the property of the city. In deciding the case, this court said that while the general rule is that municipal corporations possess the incidental right to dispose of the property, real and personal, of the corporation, of a private nature, unless restrained by charter or statute, yet they cannot dispose of property of a public nature in violation of the trusts upon which it is held. The sale of the land by the city was sustained for the reason that although it had been purchased for the purposes of a public park, no steps had been taken to dedicate or apply it to that use. We find no conflict between the views expressed in the case just cited and the decision in City of Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305. In the latter case, the city sold no property held for a public use, but disposed of shares of stock held by it in a private corporation. Indeed, the rule now under consideration is impliedly recognized. The court say: "The right to sell property not held for a public purpose is an incidental power inherent in all corporations public or private, unless withheld by the law under which they were organized."

[41] In the case of the Huron Waterworks Co. v. City of Huron, 7 S. Dak. 9, 58 Am. St. Rep. 817, 62 N. W. 975, the court, in a very carefully prepared opinion, and after an exhaustive discussion of the question by counsel, held that the waterworks of the city, constructed under a power conferred upon the city by its charter to construct and maintain waterworks for pro-

tection against fires, and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, and constructed and maintained at the expense of the inhabitants of said city, were held as the property of the municipal corporation for public use, and charged with a public trust, of which the inhabitants of said city were the beneficiaries. Being so held, the court decided that the duty of the municipality as trustee of such public trust could not be discharged and devolved on another by a sale of such waterworks by the city's common council without legislative authority.

The supreme court of Utah, in Ogden City v. Bear Lake etc. Co., 16 Utah, 440, 52 Pac. 697, declared that the provision of the charter of Ogden City, authorizing it to lease, convey, and dispose of property, real and personal, for its benefit, did not authorize it to lease or otherwise transfer its waterworks system or its water right used in supplying its inhabitants with water. A special provision was held necessary to authorize the transfer of property so used.

In Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 333, it is said that the water system and other public utilities of a city are held by the municipality and its officers in trust for the public purposes for which they were acquired and dedicated. The city and its officers may not renounce this trust, disable themselves from discharging it, or so divert or impair the public utilities that they become inadequate to accomplish the public purposes for which they were created.

[42] A municipal corporation has no implied authority to dispose of lands which have been conveyed to it for the public benefit: Tiedeman on Municipal Corporations, sec. 229. Upon the same principle it has been held in many cases, in this and other states, that the property of a public corporation dedicated to or used for public purposes cannot be sold under any legal process: Lowe v. Board etc., 94 Ind. 553, and cases cited. "Where property is owned by the corporation for any public use or in trust, such as public buildings, fire-engines, waterworks, hospitals and sanitariums, the property cannot be reached by the writ of execution, and, as a necessary consequence of that conclusion, the judgment lien will not attach to such property": Tiedeman on Municipal Corporations, sec. 212.

It seems clear, upon the soundest reasoning and from the great weight of authority, that property held and used by a city for public purposes is held in trust for the inhabitants,

and cannot be sold or disposed of unless the city is specially authorized by the legislature to make such sale or disposition and thereby determine the trust. We find no such authority to dispose of property subject to a public use in the statutes of this state, except in the particular case referred to in sections 3541, clause 47, 3550a of Burns' Revised Statutes of 1901 (Acts 1895, p. 151), and this act applies only to cities having a population of less than two thousand two hundred.

The remaining question is whether waterworks and an electric light plant constructed or purchased by the city and maintained by it for the extinguishment of fires, for domestic purposes, for lighting the streets, and for use in the houses of the inhabitants of the city, are to be regarded as property devoted to a public use. Among the enumerated powers of cities under the general statutes of this state is the right to construct and establish works for furnishing the city with wholesome water: Burns' Rev. Stats. 1901, sec. 3541, cl. 26; Rev. Stats. 1881 (Horner's Rev. Stats. 1901), sec. 3106, cl. 26. And any city having a population of more than five thousand may purchase [43] waterworks owned by any person, corporation, or company: Burns' Rev. Stats. 1901, secs. 4272a, 4272e. So, too, full authority is given to cities to construct, own, and operate gasworks and electric light plants for the purpose of lighting their streets and alleys, and furnishing light to their inhabitants: Burns' Rev. Stats. 1901, secs. 3541, cl. 28, 3543a et seq., 4301; Acts 1883, p. 85.

The right to furnish water for protection against fire, to clean the streets, to flush the sewers, and for the supply of the inhabitants, and the right to light the streets and public places, and to furnish gas or electricity to the inhabitants, are among the implied and inherent powers of a municipal corporation for the protection of the lives, health, and property of the inhabitants of the city, and, as to the lighting, as a check on immorality and crime. Unquestionably, these are public purposes: Corporation of Bluffton v. Studabaker, 106 Ind. 129, 6 N. E. 1; City of Crawfordsville v. Braden, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 849; Foland v. Town of Frankton, 142 Ind. 546, 41 N. E. 1031; Town of Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058.

It is said in Huron Waterworks Co. v. City of Huron, 7 S. Dak. 9, 58 Am. St. Rep. 817, 62 N. W. 975: "It is difficult to perceive upon what principle a distinction can be made between the

waterworks of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes and the courts in the later decisions seem to make no such distinction."

Again, Mr. Tiedeman states that: "As long as the government exercises the right directly and for the state's immediate benefit, no difficulty is experienced in determining what is a public use. There can be no doubt that land is devoted to a public use, when it is taken for the purpose of laying out parks, and public gardens, for the construction of public buildings of all kinds, waterworks, aqueducts, [44] drains, and sewers, and the building of levees": Tiedeman on Municipal Corporations, sec. 234, and cases cited in note 2.

In City of Rochester v. Town of Rush, 80 N. Y. 302, the court of appeals uses this language: "I am unable to perceive that in any sense the waterworks can be regarded as private property of the city as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings upon the part of the assessors of the town of Rush in regard thereto, can-can be sustained."

In Town of West Hartford v. Board etc. Hartford Water Commrs., 44 Conn. 360, the court expressed itself thus: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not indeed as a discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose, the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good." To the same effect are the following cases: Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924; Meriwether v. Garrett, 102 U. S. 473; New Orleans v. Morris, 105 U. S. 600.

In our opinion, waterworks and electric light plants held, owned, and maintained by cities, as were those described in the complaint, must be regarded as property held in trust for a

public use. Nor do we think they lose that character by reason of the fact that water and light are supplied to the inhabitants for domestic purposes, and that rentals and charges are paid for the same. As far as the [45] allegations of the complaint were material, they were sustained by the proof.

It follows from what we have said that the demurrer to the complaint was properly overruled, and the motion for a new trial denied.

We find no error. Judgment affirmed.

The Principal Case is supported by Huron Waterworks Co. v. Huron, 7 S. Dak. 9, 58 Am. St. Rep. 817, 62 N. W. 575. See, also, Sumner County v. Wellington, 66 Kan. 590, 97 Am. St. Rep. 396, 72 Pac. 216.

POLK v. JOHNSON.

[160 Ind. 292, 66 N. E. 752.]

RECEIVERS—Consulting the Parties Respecting Their Selection.—While the ultimate selection of a receiver rests solely with the court, to be determined by the exercise of its discretion, it is proper for the judge to take counsel with those interested in the trust with respect to the most proper selection. The usual course in the English courts is for the interested parties to nominate suitable persons from whom the master chooses the one whose fitness and qualifications his judgment most approves, and reports his selection to the court. (p. 277.)

RECEIVERS Appointed in Pursuance of a Contract with the Persons Interested.—The court will closely scrutinize all bargains made between the parties in interest and the person wishing or willing to serve as receiver. If the bargainee is qualified and the contract free from overreaching and beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms. (p. 278.)

CONTRACTS—Waiver of Compensation.—A person may waive compensation for labor performed, both before and after its completion, and cannot afterward change his mind and charge for that which he undertook to do as a gratuity. (p. 278.)

RECEIVER—Agreement to Serve as Without Compensation.—One who is interested incidentally in a business which is about to go into the hands of a receiver, and who, professing to be influenced by that interest and his friendship for the parties, seeks the appointment of receiver and promises, if appointed, to serve without compensation, cannot, after the parties and others, moved by such promise, solicit and secure his appointment, repudiate the promise and obtain an allowance from the court for his services. (pp. 279, 280.)

A CONTRACT FOR GRATUITOUS SERVICE is not Invalid for Want of Consideration, if the person promising to render such service receives all the material benefits which were anticipated when the promise was made, as where his property or business is incidentally benefited, or the performance of the act affords him pleasure, gratifies his ambition, pleases his fancy, or is an expression of his appreciation of the service another has done him. (p. 280.)

L. J. Hackney, C. F. Coffin, William Eldridge and E. F. Barker, for the appellant.

G. M. Overstreet, E. L. Branigan, E. A. McAlpin, R. M. Miller and H. C. Barnett, for the appellees.

[293] HADLEY, C. J. Appellant James T. Polk conducted a large canning and dairy business at the town of Greenwood. His affairs became greatly involved, and he probably insolvent. Tingle, a creditor for a small amount, brought an action in the Johnson circuit court for judgment on an account, and for the appointment of a receiver. Polk answered, admitting the averments of the complaint, and confessing that a receiver ought to be appointed. Whereupon the court appointed appellee Grafton Johnson as such receiver, who qualified and entered upon the discharge of his duties. In his amended final report as such receiver, Johnson claimed an allowance for his services in the trust in the sum of twenty thousand dollars.

Appellant Polk filed exceptions to said report, subdivision 1 of exception 2 being as follows: "It is shown to the court that the property and business of the estate of said receivership have at all times been located at the town of Greenwood, whose population was, when the receiver herein was appointed, about one thousand, and was, to a considerable degree, supported by said business; that said Johnson and his family, when this proceeding was instituted, owned vast properties in and about said town, consisting of business houses and rental dwellings and farming lands, the rental value and rentals of which depended, in a great measure, upon the continued operation of said business—the said business employing the principal part of the labor of said community; that, in addition to said interests of said Johnson in the prosecution of said Polk's business, he was conducting a banking business which was patronized by said Polk, and said Johnson at said time was a creditor of said Polk in a large sum, the success of which credit, in a measure, depended upon the value of the plant and business of said Polk, and said value depended almost wholly upon the continued prosecution of said business. In view [294] of the foregoing facts, the said

Johnson, well knowing that the court, or the judge thereof, would probably not appoint a receiver of said property and business who was objectionable to said Polk, sought said Polk, and importuned him to make no objection to his [said Johnson's] appointment as receiver, and to consent to and to request the court to appoint him such receiver; that to induce and persuade said Polk so to withhold objection and so to consent and request, the said Johnson urged that his above-named interest in the business of said Polk, and its successful operation, and his personal friendship for said Polk were such that he could and would, if appointed receiver, discharge the duties of the trust with diligence and fidelity, and without allowance or compensation other than he would receive from the advantages to the said properties, to the said banking business, and to the amount so owing to him; that by reason of the said interests of said Johnson in the success of said business, and by reason of this said promise to discharge the duties of receiver without allowance as aforesaid, the said Polk did not object to said Johnson's appointment as receiver, but consented to such appointment, and requested the court and the judge thereof that said Johnson, by reason of said promises, be appointed receiver of said property and business; that in addition to his said consent and request for the appointment of said Johnson, other persons interested, personally and as creditors of said Polk, requested the court and judge thereof so to appoint said Johnson, because of the economy to said estate in conducting the receivership without salary, fees, or allowances; that in view of the facts aforesaid, and of the further facts that the said Johnson was well qualified for the duties, he was appointed and acted as receiver of said estate. And of each and all of the foregoing facts the said Polk offers to make proof."

The receiver's motion to strike out the above exception, because the same did not contain facts sufficient to constitute [295] a valid objection to the report, was sustained, and the receiver allowed nine thousand five hundred dollars for his services. This action of the court presents the controlling question in the case.

1. We assume at the outset that there is no reasonable ground for discussion upon the first proposition advanced by appellee, viz., that the litigants have no power to select a receiver for the court by private agreement, even though such agreement is based upon their views of the fitness of the one chosen, and economy to the trust in his appointment. We also take it to

be generally acknowledged that the appointment of the receiver, and the fixing of his compensation, are judicial acts that cannot be abdicated by the court to one or both the parties to the suit. But while it must be conceded that the ultimate appointment rests solely with the court, to be determined by the exercise of his discretion, we find no principle recognized by the authorities, or supported by sound reason, that forbids the judge the freest access to the counsels and opinions of those interested in the trust, with respect to the most proper selection. Indeed, there are many reasons why the cautious judge would seek the advice of others, in cases where he has imperfect knowledge of the fitness of available men, even outside of the parties in interest. There is nothing peculiar in the appointment of a receiver, that his selection must be evolved wholly from the personal knowledge and observations of the judge. The usual course of practice in the English court of chancery in such matters was to refer the selection to a master. Then interested parties were at liberty to appear before the master and nominate suitable persons, from among whom the master would choose the one whose qualifications and fitness his judgment most approved, and report his selection to the court. A similar practice also prevailed in New York prior to their adoption of the present Code of Procedure: High on Receivers, 3d ed., secs. 63, 64.

The same considerations that induced the reference to a master under the old practice are now applicable to the 206 judge, who is called upon to act without a reference, and who will usually give favorable consideration to one that has been agreed upon by the parties: High on Receivers, 3d ed., sec. 65; Beach on Receivers, 2d ed., secs. 30, 31; Smith on Receivers, 62.

2. But it is argued that the agreement entered into for the purpose of influencing the appointment was an unwarrantable interference with the freedom of judicial action, and invalid for public impolicy. It will be borne in mind that in the appointment of a receiver, or other such administrative officer, the chief ends to be attained are efficiency and economy in the administration of the trust. It is the officer, and not the mode of selection, that the law regards as important; and, outside those prohibited by statute, the judge, in the exercise of his sound discretion, will select from among those available the one whom he believes, from all the circumstances, will give the most beneficial service. And if efficiency and economy can be secured

by private agreement, open and fairly entered into, with one who is willing to perform the work of administering for considerations moving to him wholly outside the trust, we perceive no principle of law, or public policy, that forbids the making of such a contract. The court will closely scrutinize the bargain, when known to him, and if it seems clear that the bargainer is qualified, and the contract free from overreaching and will be beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms: State v. Johnson, 52 Ind. 197; Ross v. Conwell, 7 Ind. App. 375, 34 N. E. 752; Bate v. Bate, 74 Ky. 639; Ephraim v. Pacific Bank, 136 Cal. 646, 648, 69 Pac. 436; Steele v. Holladay, 19 Or. 517, 25 Pac. 77; Secor v. Sentis, 5 Redf. Sur. 570; Bowker v. Pierce, 130 Mass. 262; In re Hopkins, 32 Hun, 618; Rote v. Warner, 17 Ohio C. C. 342, 350; M'Caw v. Blewit, 2 McCord Eq. (S. C.) 90; Bassett v. Miller, 8 Md. 548; Dolfield v. Kroh, 62 Md. xiii; Koch's Estate, 148 Pa. St. 159, 23 Atl. 1057; In re [207] Hay's Estate, 183 Pa. St. 296, 38 Atl. 622; Kerr on Receivers, 3d ed., 185.

Beyond question, a person may waive compensation for any labor performed, both before and after completion; and it is a familiar doctrine that one cannot, after performance, change his mind, and charge for that which he agreed and undertook to do as a gratuity: In re Estate of Davis, 65 Cal. 309, 4 Pac. 22; Barry v. Barry, 1 Md. Ch. 20; Ridgely v. Gittings, 2 Har. & G. (Md.) 58; In re Cooper, 93 N. Y. 507, 512; Mulligan's Estate, 157 Pa. St. 98, 27 Atl. 398; Barksdale v. Vestry etc. Christ Church Parish, 1 Strob. Eq. (S. C.) 197.

According to the averments of the exception, appellant Polk owned and was conducting a large canning and dairy business at Greenwood, employing therein most of the labor of the community, and contributing largely to the support of the population of the town. Johnson and his family owned vast properties in and about the town, consisting of business houses, rental dwellings, and farm lands, the rental value of all of which depended largely on the continuance of Polk's business. Polk also kept his business account with Johnson's bank in said town, and owed the latter a large sum of money, which he probably could not pay if deprived of his business. Johnson sought out Polk and recited to him the foregoing considerations, and the vast importance he personally felt in keeping him (Polk) upon his feet, and his business going, and importuned the latter to assist him (Johnson) in procuring appointment

to the position of receiver, and, to induce such assistance, promised and agreed, if appointed, to discharge the duties with diligence and fidelity, and without any charge or compensation beyond the benefits he would secure to his property, to his banking business, and in the collection of his debt; that relying upon Johnson's promise to perform the duties of receiver without an allowance, and other promises, Polk requested the court that said Johnson, by reason of his said [298] promises, be appointed such receiver, and others interested in the estate, for like reason and considerations, made similar requests of the court. The court, acting upon these requests, made the appointment.

Here, then, we have a contract entered into in good faith by the debtor, who, perhaps above all others, desired and sought the payment of his debts, and restoration to the control of his business. We may assume that he would not have requested the appointment of appellee, but for the special inducement held out, and, furthermore, that the court would not have appointed him, had he not been requested so to do by the debtor and a number of his creditors. The question therefore is, Shall fraud and deception prevail? To permit appellee to repudiate his solemn engagement, and receive the compensation usual for such services, is to give the sanction of the law to craftiness and chicanery as a means of securing an important and highly remunerative position, not otherwise obtainable. This cannot be the law. It is not averred in the exception whether or not the private agreement of Johnson was communicated to the court before his appointment, or that the court had or had not knowledge of it at the time the appointment was made. But while in such cases the proper course is fully to acquaint the judge with the nature and terms of such private treaty before he acts upon the appointment, yet, as between the enforcement of an agreement fairly made with all the beneficiaries of the trust, or made with some of them manifestly for the best interest of all, and by reason whereof his appointment is secured, and permitting such agreement to be used as a cloak to secure a coveted position by double dealing, it is much more in accord with public policy and sound morality to require performance, than to allow the obligee to put aside his covenant after it has served his artful purpose. It is no excuse for appellee to say that he found the duties of the office more onerous than he expected. When he found his expectations disappointed, [299] he was at liberty to resign and give the position over to another; but,

having held on to it, he will be deemed to have held it upon the terms upon which it was sought and undertaken.

3. The contention, that the contract for gratuitous service is invalid for want of a sufficient consideration, cannot be sustained. Appellee received all the bargain called for. He received Polk's assistance in procuring the appointment, and incidentally enjoyed all the material benefits to his property anticipated. There being at least some legal consideration rendered, what was accepted by him at the time as satisfactory will be adjudged by the court as sufficient. As was well expressed by this court in Wolford v. Powers, 85 Ind. 294, 303, 44 Am. Rep. 16: "Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases under mention, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this be not so, then the result is that the court substitutes its own judgment for that of the promisor, and, in doing this, makes a new contract." See, to the same effect, Vigo etc. Soc. v. Brumfiel, 102 Ind. 146, 52 Am. Rep. 657, 1 N. E. 382; Keller v. Orr, 106 Ind. 406, 7 N. E. 195; Price v. Jones, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683; Shover v. Myrick, 4 Ind. App. 7-10, 30 N. E. 207.

There are other subsidiary questions in the record that are not likely to arise again, and hence have not been considered.

The judgment of the trial court is reversed.

Receivers.—Grounds for the appointment of a receiver are discussed in the monographic note to Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 29-97. As to who may act as a receiver, see McGillard v. Donaldson Foundry etc. Works, 104 La. 544, 81 Am. St. Rep. 145, 29 South. 254.

That a Contract is not invalid for want of consideration where a person contracts for the performance of an act which affords him pleasure, gratifies his ambition, or pleases his fancy, see Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Eaton v. Libbey, 165 Mass. 218, 52 Am. St. Rep. 511, 42 N. E. 1127. See, also, Talbott v. Stemmons, 89 Ky. 222, 25 Am. St. Rep. 531, 12 S. W. 297.

BRAZIL BLOCK COAL COMPANY v. GIBSON.

[160 Ind. 319, 66 N. E. 882.]

MASTER AND SERVANT—Pleading Want of Notice of Defects in Appliances.—Though a defect in an appliance is visible to ordinary observation, yet a complaint which avers that the plaintiff had no knowledge of such defect, because the darkness of the place in which he worked gave him no opportunity to inspect the appliance closely or learn its exact condition, and that he had nothing to do with such appliances and was wholly unfamiliar with them, sufficiently discloses and justifies plaintiff's want of knowledge of the defect of which he complained. (p. 285.)

MASTER AND SERVANT—Safe and Suitable Appliances.—It is the duty of the master to exercise ordinary care in furnishing appliances reasonably safe and suitable for performing the work required of the servant. The duty is a continuing one, and the servant is entitled to rely on the master's having performed it. (p. 285.)

MASTER AND SERVANT—Appliances, Risks of.—A servant does not assume the increased risks and hazards of the master's negligence in furnishing unsafe and unsuitable appliances, unless the servant knew, or by the exercise of ordinary care could have known of the defective appliance and of the danger attendant on its use. (p. 286.)

EVIDENCE—Statement, When not of an Opinion but of a Fact.—The statement of a witness who worked in a mine in which the plaintiff was injured that he was unable, while at work in the bottom of the shaft, to determine in the darkness whether a ring used was a welded or a lap ring without making an examination of it, is a statement of fact and not of opinion, and is admissible in evidence, to be considered in determining whether the defect in the ring was known to the plaintiff or could have been known by the exercise of ordinary care under the conditions in the mine while he performed his duties in the shaft. (pp. 286, 287.)

EVIDENCE, Materiality of, Waiver of Right to Question.—One who, on the cross-examination of a witness, inquired of the size, shape and capacity of a bucket and the material of which it was made, cannot complain because his adversary, on re-examination, inquired into like matters, including the character of the ring used on the bucket, though such ring is admitted to be different from that on another bucket, from a defect in which the injury resulted for which the plaintiff seeks to recover. (p. 287.)

EVIDENCE.—Testimony of a Change in an Appliance After an Injury had Resulted from It is admissible, though not made by the defendant or any party to the action, if its purpose is merely to show that the appliance had been changed before certain witnesses saw it and thus to account for their giving a different description of its condition from other witnesses who saw it only before such change had been made. (p. 287.)

EVIDENCE.—Testimony that buckets in being hoisted out of a mining shaft would strike its sides is admissible for the purpose of showing the manner in which they were hoisted and lowered. (p. 287.)

MASTER AND SERVANT—Perils and Defects, When Assumed.—An Employé is Required to Observe and Avoid all Known

and Obvious Perils, even though they arise from defective machinery or appliances, but he is not bound to search for defects or make a critical examination of the appliances provided for his use. (p. 288.)

MASTER AND SERVANT.—A Servant may Rely on the Duty of His Master to Furnish Reasonably Safe and Proper Appliances and to Properly Inspect Them having been properly performed, unless defects are such as to be obvious to the servant while giving proper attention to the duties of his employment. (p. 288.)

MASTER AND SERVANT—Defects—Question for the Jury. Whether an alleged defect by which an employé was injured was obvious, or whether he knew of it, or by the exercise of ordinary care should have known of it and apprehended the risks and hazards on account thereof, are questions for the jury under proper instructions. (p. 288.)

APPEAL AND ERROR—Weight of Evidence.—An appellate court cannot weigh the evidence, and where there is evidence in support of a general verdict, which sustains it and all the material issues, it will not be distrubed on appeal. (pp. 288, 289.)

G. A. Knight, for the appellant.

J. M. Rawley, T. W. Hutchinson, A. W. Knight, S. D. Coffey and S. M. McGregor, for the appellee.

[320] MONKS, J. This was an action brought by appellee to recover damages for personal injuries. The complaint was in three paragraphs. Appellant's demurrer to each paragraph for want of facts was overruled as to the first and third paragraphs, and sustained as to the second paragraph. The third paragraph was withdrawn by the appellee at the trial. The appellant filed a general denial. A trial of the cause by a jury resulted in a verdict in favor of appellee, on which the court, over appellant's motion for a new trial, rendered judgment for appellee.

The errors assigned and not waived are: 1. That the court erred in overruling the demurrer to the first paragraph of the complaint; and 2. That the court erred in overruling the motion for a new trial.

The first paragraph of the complaint alleges that appellant is a domestic corporation engaged in the business of [321] mining coal in the counties of Clay and Parke, in this state; that on the thirteenth day of September, 1900, and for two or three months prior thereto, appellant, in prosecuting its business of mining coal, was engaged in sinking a shaft near the town of Caseyville, Parke county, Indiana; that said shaft was being formed by making a vertical excavation, and hoisting the accumulated earth to the surface; that on the foregoing date the work of excavating had proceeded to such an extent that the shaft was about eighty-six feet deep; that the loose earth that accumulated

at the bottom of the shaft during the excavation was loaded into a large bucket that was lowered into said shaft and hoisted to the surface by an engine; that said bucket was made of iron, and was capable of holding about fifteen hundred pounds of earth at a load; that said bucket was furnished with a bail, which was attached to each side and somewhat below the middle of the bucket, so that when filled the bucket could be easily tipped, and the earth thus thrown from it; that said bucket was further equipped with a narrow strip of iron three or four inches long, called a "stub," which was welded to one side of the bucket near the top of the rim so that it extended two or three inches above the rim, near the bail and parallel with it; that, to prevent said bucket from tipping and spilling the earth that it contained while being hoisted to the surface, an iron ring was put on the handle or bail so that it could be placed over the stub before referred to, thus firmly to hold the bucket upright; that said bucket was lowered and hoisted by a rope and a hook attached to the bail, the rope connecting with the engine aforesaid; that said iron ring was not solid, the ends thereof not being welded but overlapping each other one or two inches.

It is further alleged that on said thirteenth day of September, 1900, and for some time prior thereto, appellee was in the employment of appellant, in sinking said shaft, as a common laborer; that on said day appellee was working at the [322] bottom of said shaft, shoveling earth into said bucket; that appellee, with others working at the bottom of said shaft, had filled said bucket with earth, and the same had been hoisted to the top of the shaft, when suddenly, and without any warning, the iron ring referred to spread apart and became loosened from the iron stub round which it had been placed, thus causing the bucket to tip, and the earth it had contained to be precipitated down the shaft; that said bucket at this time contained about fifteen hundred pounds of earth, which in so falling struck the appellee on the head and the back, and that by reason thereof the appellee was greatly hurt and bruised; that by reason of said injuries he has lost two months of labor during which he could have earned one hundred dollars, and that he has expended two hundred dollars for nurse hire, medicines, and medical attention in treating said injuries.

It is further alleged that said accident occurred because said ring was unfit and improper for the use to which it was put; that it was unfit because the ends overlapped, and were not

solidly welded, thus permitting the ends thereof to spread, and to loosen the ring from round the stub; that said ring was old, rusty, worn, cracked, "and was too frail to resist the strain placed upon it"; that said ring had been constantly used for about twelve months, and on account of such long-continued use and its cracked condition it had become weak and unfit for use, and was not of an approved style, form, quality, and construction; that the appellant had knowledge of the defective condition of said ring, and its unfitness for use, or could have known thereof by the exercise of ordinary diligence, but negligently and carelessly used the same notwithstanding such defective and unfit condition; that the appellee had no knowledge whatever that said ring was unfit for use, unsafe, defective, and had been in use a long time, and was not of an approved style, quality, and construction, or that the same was cracked; that he had nothing whatever to do with the handling of said bucket and the adjusting of said ring on the stub; that he was [323] wholly unfamiliar with such appliances, and was ignorant of the proper kind, quality, and construction of such rings as were used on this bucket, or of any other rings; that from the observations he had made of said ring it appeared to be amply safe and fit to do the work required of it, and that he noticed no defect therein, and supposed it a ring proper for the use to which it was put; that the appellee did his work at a great depth beneath the surface, and on account of the darkness did not have the opportunities and facilities to inspect said ring closely, but from what he observed he believed said ring to be welded, and was unable to observe any crack therein, and that he was compelled to rely upon the assurance that the appellant, in furnishing and providing said bucket and its equipments, had done its duty in furnishing appliances safe and proper for the work to be performed; that, if said ring had been sound, solid, and of a proper kind, the said accident should not have occurred, and that said accident did occur solely because of the negligence of appellant in the particulars hereinbefore set forth, and that said accident occurred without any fault or negligence on the part of appellee. Wherefore, etc.

It is manifest that this paragraph of the complaint proceeds upon the theory that the appellant failed to discharge its duty as a master to use ordinary care to furnish to the appellee reasonably safe appliances with which to perform the labor required of him as a servant. It is argued by appellant that this paragraph is insufficient on demurrer for want of facts, on the

grounds: 1. That the alleged defect in the ring was obvious; 2. That it was as open to the observation of the appellee as it was to the observation of the appellant, and that the appellee had, therefore, assumed the risk of the defective appliance.

It is very clearly alleged in this paragraph of the complaint that appellee had no knowledge whatever that said ring was defective or unfit for use; that appellee had nothing to do with the handling and adjusting of said ring; that [324] he was wholly unfamiliar with such appliances; and that, because of the darkness in the shaft in which he worked, the appellee had no opportunity to inspect the ring closely to learn of its exact condition. While the general allegation that the servant had no knowledge of the defective condition of the appliance that the master furnished may not be sufficient where the complaint discloses, by the facts alleged, that the servant should have known of the defect producing his injury, it cannot be said here that the facts alleged impair the force of the general allegation. We think the particular allegations re-enforce the general one, and explain in detail why the appellee did not, and could not, know of the defective and unsafe condition of the ring. It does not appear from this paragraph that, in his circumstances, the defect was obvious to appellee; or that he, equally with the master, had opportunity to observe the defective condition of the ring. It was not a part of his work to handle the ring. The place in which he worked was dark so that he could not see the ring clearly. He did not know what constituted a proper ring. It was not his business to investigate. Appellee was the foreman of the men engaged in filling the buckets, and worked with them, and, so far as appears from the complaint, this work did not place him in a situation to know the nature of the appliances which caused his injury.

It is the duty of the master to exercise ordinary care in furnishing appliances reasonably safe and suitable for performing the work required of the servant. The duty is a continuing one, and the servant is authorized to rely on the master's having properly performed it: Evansville etc. R. R. Co. v. Duel, 134 Ind. 156, 158, 33 N. E. 355; Nall v. Louisville etc. R. Co., 129 Ind. 260, 271, 28 N. E. 183, 611; Ohio etc. R. R. Co. v. Pearcy, 128 Ind. 197, 203, 27 N. E. 479; Louisville etc. R. R. Co. v. Quinn, 14 Ind. App. 554, 557, 43 N. E. 240; 20 Am. & Eng. Ency. of Law, 2d ed., 71, 73.

[325] The servant assumes the risks and hazards ordinarily incident to the employment which he undertakes; but he does not

assume the increased risks and hazards of the master's negligence in furnishing unsafe and unsuitable appliances, unless the servant knew, or, what is the same, could have known by the exercise of ordinary diligence under the circumstances of the case, of the defective appliances, and of the danger attendant thereupon: Wright v. Chicago etc. R. R. Co., 160 Ind. 583, 66 N. E. 454; Wabash etc. R. R. Co. v. Ray, 152 Ind. 392, 399, 400, 51 N. E. 920; 20 Am. & Eng. Ency. of Law, 2d ed., 123, 124. The trial court, therefore, did not err in overruling the appellant's demurrer to this paragraph of complaint for want of facts.

It is asserted that the court erred in permitting a witness for the appellee, who worked in the mine in which appellee was injured, to state in answer to a question by the appellee, that he was not able while at work at the bottom of the shaft to determine in the darkness whether the ring used was a welded or lap ring without making an actual examination thereof. The witness, before the evidence objected to was given, had stated that he was a day employé at the mine, working at the bottom of the shaft, shoveling earth; that he used a "bank lamp"; that "it wasn't light or it wasn't dark" in the shaft, and "was a little bit dark and a little bit light." It is a difficult matter, by mere description, to put a jury in the possession of accurate knowledge of the condition of the light in the mine. Whether the witness, who worked under substantially the same conditions as the appellee, could see the ring without an actual examination thereof, brought the matter more definitely and more accurately before the jury. It was not the statement of an opinion; it was the statement of a fact. This evidence was proper for the consideration of the jury in determining whether or not the defect in said ring was known to appellee, or could have been known in the exercise of ordinary [326] care under the conditions in the mine while he was performing his duties in said shaft. The servant does not assume the risk of defects in appliances furnished not discoverable in the exercise of ordinary care: Wabash etc. R. R. Co. v. Morgan, 132 Ind. 430, 446, 31 N. E. 661, 32 N. E. 85; Louisville etc. R. R. Co. v. Wright, 115 Ind. 378, 384, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; Louisville etc. R. Co. v. Howell, 147 Ind. 266, 270, 271, 45 N. E. 584.

Appellant insists that the court below erred in permitting the witness William Snow, for the appellee, to testify, on re-examination, that a welded ring was used on the other bucket employed in raising the earth from the same shaft in which appellee was injured. The ground of objection at the trial was that this evidence was immaterial, because this bucket was not in con-

troversy. Appellant's counsel, on cross-examination of this witness, inquired into the size and capacity of this bucket, its shape and the material of which it was made. Having done this it cannot complain that appellee was permitted to inquire into other like matters of its construction and equipment, including the character of the ring used thereon. Appellant opened the door for this evidence, and cannot be heard to object to the same even if it was immaterial as claimed—a question we do not decide: Wabash Printing etc. Co. v. Crumrine, 123 Ind. 89, 94, 95, 21 N. E. 904; Perkins v. Hayward, 124 Ind. 445, 449, 24 N. E. 1033, and cases cited; Blough v. Parry, 144 Ind. 463, 483, 40 N. E. 70, 43 N. E. 560, and cases cited; Ewbank's Manual, sec. 255.

It is objected that the court erred in permitting Harvey Bramblett, a witness for the appellee, to testify that after the accident he, with another, hammered the laps of the ring together and hooked the bucket up so that it could be taken off the truck and out of the way. Witnesses who testified to having seen the ring at different times after the accident, testified differently as to its condition when seen. It was proper, therefore, for appellee to show that its condition had been changed before certain witnesses saw it, and it was immaterial whether it had been changed by appellant's [327] agents or by a stranger. The material question was whether, at the time certain witnesses testified to having seen it, it was in the same condition that it was in immediately after the injury. The doctrine of agency has no application. The court did not err in receiving this evidence.

There was no error in permitting the witness James Walters, for the appellee, to state that frequently the buckets in being hoisted would strike against the sides of the shaft. The construction of the bucket which caused the injury and the manner of operating it were matters necessary to be considered in determining the issues in this cause. It was proper, therefore, to prove the manner in which the buckets were hoisted and lowered in said shaft, and, if they struck against the sides of the shaft on being hoisted or lowered, such fact was clearly not "immaterial." The evidence of this witness that he never noticed any difference between the management of the appellant's shifts, even if it could be said to have been erroneously received, was immaterial and could not have been prejudicial to appellant.

Objections are made to the evidence of other witnesses, but such objections are waived by appellant's failure to argue here

the grounds of its objections presented below: Musser v. State, 157 Ind. 423, 430, 431, 61 N. E. 1, and cases cited.

Objection is made to the giving of the seventh, thirteenth, fourteenth, fifteenth, and twenty-first of the instructions, concerning the employé's assumptions of risks, and the master's duty to furnish reasonably safe appliances, and to inspect the same, asked by the appellee. It is insisted that these instructions are not relevant to the issues or applicable to the evidence, and are in conflict with other instructions given. It is true that a servant assumes all risks of which he knew, or of which, by the exercise of ordinary diligence, he could have known (Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 53 N. E. 763); and where the hazard is alike open to the [328] observation of both, the master is not liable to the servant for injury resulting therefrom: Wabash etc. R. R. Co. v. Ray, 152 Ind. 392, 51 N. E. 920; Louisville etc. R. R. Co. v. Kemper, 147 Ind. 561, 47 N. E. 214. "An employé is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances that are provided for his use. These are the duties of the employer": Cincinnati etc. R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; Ohio etc. R. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479. It thus being the duty of the master to furnish reasonably safe and proper appliances, and properly to inspect the same, the servant may rely upon the duty having been performed, unless the defects are such as to be obvious to the servant while giving proper attention to the duties of his employment: Louisville etc. R. R. Co. v. Buck, 116 Ind. 566, 573, 9 Am. St. Rep. 883, 19 N. E. 453; Bradbury v. Goodwin, 108 Ind. 286, 290, 9 N. E. 302; Louisville etc. R. R. Co. v. Howell, 147 Ind. 266, 270, 271, 45 N. E. 584; Bailey on Personal Injuries, sec. 802.

Whether, under the evidence, the alleged defect in the ring was obvious, or whether the appellee knew, or by the exercise of ordinary care should have known, of it, and appreciated the risks and hazards on account thereof, were questions properly submitted to the jury under appropriate instructions: Diezi v. G. H. Hammond Co., 156 Ind. 583, 60 N. E. 353; Bailey on Master's Liability, 188-190; Wood on Master and Servant, 2d ed., sec. 366, and notes. The instructions mentioned, when construed with the other instructions given, are not open to the objections urged, and the instructions as a whole correctly and

fairly presented the law of the case to the jury. There was no error, therefore, in the giving of said instructions.

It is contended, also, that the verdict of the jury is not sustained by sufficient evidence, and that it is contrary to law. It is well settled that this court cannot weigh the [329] evidence, and, where there is evidence in support of the general verdict, which sustains it on all the material issues, the verdict will not be disturbed on appeal: National State Bank v. Sanford etc. Co., 157 Ind. 10, 15, 60 N. E. 699; Ewbank's Manual, sec. 46. After carefully reading the evidence, we are not prepared to say that it does not sustain the verdict, or that the verdict is contrary to law.

Judgment affirmed.

LIABILITY OF A MASTER TO HIS SERVANT FOR INJURIES RESULTING FROM DEFECTIVE MACHINERY AND APPLIANCES.*

I. Care Required of the Employer.
- a. Duty to Provide.
  - 1. Not an Insurer.
  - 2. Ordinary and Reasonable Care.
  - 3. Use of Latest or Best Appliances.
    - A. Not Required.
    - B. Should Keep Reasonably Abreast of Modern Improvements.
  - 4. What is Ordinary Care.
    - A. How Determined.
    - B. General Custom as a Measure Thereof.
    - C. Risks to be Apprehended.
  - 5. Animals as Instrumentalities for Work.
- b. Duty to Repair.
  - 1. Must Use Reasonable Diligence.
  - 2. Must have Opportunity to Repair.
- c. Duty to Inspect.
  - 1. Necessity Therefor.
  - 2. Common and Ordinary Tools.
  - 3. Where Appliances are Bought of Reputable Dealers.
- d. Duty to Guard or Inclose Dangerous Machinery.
- e. Explosives.
- f. Effect of Delegation of Duty to Supply, Repair, or Inpect by Master to Another.
- g. Where the Servant is Employed to Repair Defective Machinery.

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*REFERENCES TO MONOGRAPHIC NOTES.

Duty of master to furnish safe appliances: 92 Am. Dec. 213; 54 Am. Rep. 726; 59 Am. Rep. 75.
Liability of master for defects in machinery: 1 Am. St. Rep. 548.
Presumption of negligence arising from accident: 6 Am. St. Rep. 792.
Effect of master's promise to repair defects: 23 Am. St. Rep. 885.
How far a servant may rely upon the superior knowledge of the master concerning risks: 24 Am. St. Rep. 820.
Duty of railroad companies to furnish improved appliances: 65 Am. St. Rep. 732.
Safe appliances in mines: 87 Am. St. Rep. 560.

II. Knowledge of Defect by the Master.
a. Actual or Constructive Notice Necessary.
b. Notice to What Servants will Bind the Master.
III. Latent Defects.
IV. Structural Defects.
V. Where Employés are to Adjust, Choose, or Furnish Appliances Themselves.
VI. Liability of a Railroad Company for Defects on Cars of Other Companies upon Its Line.
VII. Independent Contractors.
VIII. Care Required of the Servant.
a. Reasonable Care.
b. May Assume that Machinery is Safe and Suitable.
c. Inspection by Servant.
1. Not Ordinarily Required.
2. May be Imposed by Master.
3. Where in Constant Use of Appliance.
d. Knowledge of Defect by Servant.
1. Want Thereof Necessary to Recover.
2. Where Means of Knowledge Equal.
3. Knowledge of Defect does not Imply Knowledge of Danger.
A. Rule as to Servant.
B. Rule as to Master.
IX. Assumption of Risk and Contributory Negligence.
a. Distinction Between.
b. Effect of Promise to Repair.
c. As Defenses.
1. Assumption of Risk.
A. General Rule.
B. Does not Include Master's Negligence.
C. Burden of Proof.
2. Contributory Negligence.
A. In General.
B. Where Duty on Injured Servant to Inspect or Repair the Appliance.
C. Where He is Negligent in Selecting the Appliance.
D. Contributory Negligence of Master and Fellow-servant no Bar to Recovery.
X. Proximate Cause.
XI. Burden of Proof.
XII. Evidence of Negligence.
a. Accident as Evidence Thereof.
b. Change of Machinery After Accident.
c. Insurance Against Accidents.
XIII. Allegations of Defect.
XIV. Actions Under Statutes.

I. Care Required of the Employer.

a. Duty to Provide.

1. Not an Insurer.—The rules of law regulating the liability of masters to their servants for injuries caused them by defective machinery and appliances have been established by a long line of

decisions, and but little conflict is to be found among the authorities. The difficulty which arises comes, not from the law itself, but from its application to the facts of the cases, which must from their very nature vary as the different appliances and employments vary from one another.

It is universally held that an employer does not warrant or insure the absolute safety of the instrumentalities with which he supplies his workmen: Smoot v. Mobile etc. Ry. Co., 67 Ala. 13; Louisville etc. R. Co. v. Allen, 78 Ala. 494; Little Rock etc. R. Co. v. Duffey, 35 Ark. 602; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Green v. Sansom, 41 Fla. 94, 25 South. 332; Chicago etc. R. Co. v. Pratt, 14 Ill. App. 346; Harsha v. Babicx, 54 Ill. App. 586; Cincinnati etc. Ry. Co. v. Roesch, 126 Ind. 445, 26 N. E. 171; Atchison etc. R. Co. v. Wagner, 3? Kan. 660, 7 Pac. 204; Budge v. Morgan's etc. S. S. Co., 108 La. 349, 32 South. 535; Spicer v. South Boston Iron Co., 138 Mass. 426; Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Attix v. Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436; Siela v. Hannibal etc. R. Co., 82 Mo. 430; Fifield v. Northern R. R., 42 N. H. 225; Painton v. Northern Cent. R. Co., 83 N. Y. 7; Moran v. Racine Wagon Co., 74 Hun, 454, 26 N. Y. Supp. 852; Nutt v. Southern Pac. Co., 25 Or. 291, 35 Pac. 653; Sykes v. Packer, 99 Pa. St. 465; Gunter v. Graniteville Mfg. Co., 15 S. C. 443; Galveston etc. R. Co. v. Delahunty, 53 Tex. 206; Norfolk etc. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869; Hough v. Texas etc. Ry. Co., 100 U. S. 213; Washington etc. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; Texas etc. R. Co. v. Thompson, 70 Fed. 944, 17 C. C. A. 542, 30 U. S. App. 549.

2. **Ordinary and Reasonable Care.**—In providing machinery or tools for his servants, the only duty incumbent upon the master is that he exercise ordinary and reasonable care in selecting them, in view of all the circumstances of the employment and the attendant risks and dangers. If he does so, he is not liable for injuries resulting therefrom; but if he neglects the exercise of reasonable care, he is: Louisville etc. R. Co. v. Allen, 78 Ala. 494; Brymer v. Southern Pac. Co., 90 Cal. 496, 27 Pac. 371; Sappenfield v. Main St. etc. R. Co., 91 Cal. 48, 27 Pac. 590; Wilson v. Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Green v. Sansom (Fla.), 25 South. 332; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Chicago etc. Ry. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55; Louisville etc. R. Co. v. Orr, 84 Ind. 50; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Cooper v. Central R. R. Co., 44 Iowa, 134; Conway v. Ilinois Cent. R. Co., 50 Iowa, 465; Hannibal etc. R. Co. v. Kanaley, 39 Kan. 1, 17 Pac. 324; Quaid v. Cornwall, 76 Ky. (13 Bush) 601; Cowett v. American Woolen Co., 97 Me. 543, 55 Atl. 494; O'Connell v. Baltimore etc. R. Co., 20 Md. 212, 83 Am. Dec. 549; Shauck v. Northern Cent. Ry. Co., 25 Md. 462; Tabler v. Hannibal etc. R. Co., 93 Mo.

79, 5 S. W. 810; Williams v. St. Louis etc. Ry. Co., 119 Mo. 316, 24 S. W. 782; Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184; Larkin v. Washington Mills Co., 45 App. Div. 6, 61 N. Y. Supp. 93; Myers v. Concord Lumber Co., 129 N. C. 252, 39 S. E. 960; Lake Shore etc. Ry. Co. v. Fitzpatrick, 31 Ohio St. 479; Nutt v. Southern Pac. Co., 25 Or. 291, 35 Pac. 653; Philadelphia etc. R. Co. v. Keenan, 103 Pa. St. 124; International etc. R. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668; Quintana v. Consolidated etc. Refining Co. (Tex. Civ. App.), 37 S. W. 369; Hill v. Southern Pac. Co., 23 Utah, 94, 63 Pac. 814; Watts v. Hart, 7 Wash. 178, 34 Pac. 423; Texas etc. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. Rep. 707.

Such being the law, it is erroneous for the court to instruct the jury that the employer must furnish "safe machinery," that charge being calculated to induce the jury to believe that the duty of furnishing absolutely safe machinery rests upon him: Gulf etc. Ry. Co. v. Wells, 81 Tex. 685, 17 S. W. 511, reversing 16 S. W. 1025; International etc. Ry. Co. v. Williams, 82 Tex. 342, 18 S. W. 700; Texas etc. Ry. Co. v. Huffman, 83 Tex. 286, 18 S. W. 741; Allen v. Union Pac. Ry. Co., 7 Utah, 239, 26 Pac. 297. And it is error to charge that the machinery must have been safe so far as human foresight and skill can make it: East Tennessee etc. Ry. Co. v. Aiken, 89 Tenn. 245, 14 S. W. 1082; Missouri Pac. Ry. Co. v. Lyde, 57 Tex. 505. See, also, Cleveland etc. Ry. Co. v. Selsor, 55 Ill. App. 685. In Last Chance Min. etc. Co. v. Ames, 23 Colo. 167, 47 Pac. 382, an instruction to the effect that the master's duty to his servant in supplying machinery was the same as to those nearest and dearest to him was held to require too high a degree of care.

The fact that the machine may be dangerous if improperly used, or that it actually injures the operator, is not the test of the master's liability; and it is sufficient if it is of ordinary character, such as can with reasonable care be used without danger: Smith v. Foster, 93 Ill. App. 138. But see Toledo etc. Ry. Co. v. Fredericks, 71 Ill. 294, to the effect that railroad companies must furnish safe and suitable machinery, and the law imposes on them a high degree of care in this regard.

The duty of a master to furnish suitable appliances to his employés applies to a foreman or superintendent as well as to a servant without rank or title: Attix v. Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436.

3. Use of Latest or Best Appliances.

A. Not Required.—As a corollary to the rule above set forth, the courts are unanimous in their holdings that an employer need not adopt machinery or appliances of any particular kind or character, nor provide the best and safest to be had, nor make use of every new device, although greater immunity from danger is thereby assured, and the accident would not have occurred if it had been used.

The following are some of the decisions supporting this rule: Louisville etc. R. R. Co. v. Hall, 91 Ala. 112, 24 Am. St. Rep. 863, 8 South. 371; Arkadelphia Lumber Co. v. Bethea, 57 Ark. 76, 20 S. W. 808; Hart etc. Mfg. Co. v. Tima, 85 Ill. App. 310; American Malting Co. v. Lelivelt, 101 Ill. App. 320; Towns v. Vicksburg etc. R. Co., 37 La. Ann. 630, 55 Am. Rep. 508; Wonder v. Baltimore etc. R. Co., 32 Md. 411, 3 Am. Rep. 143; Wood v. Heiges, 83 Md. 257, 34 Atl. 872; Rooney v. Sewall etc. Cordage Co., 161 Mass. 153, 36 N. E. 789; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Stiller v. Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Kent v. Yazoo etc. R. Co., 77 Miss. 494, 78 Am. St. Rep. 535, 27 South. 620; Beard v. American Car Co., 63 Mo. App. 382; Sweeney v. Berlin etc. Co., 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; Soderman v. Kemp, 145 N. Y. 427, 40 N. E. 212; Sisco v. Lehigh etc. Ry. Co., 145 N. Y. 296, 39 N. E. 958; Mason v. Richmond etc. R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, 16 S. E. 698; Pittsburg etc. R. Co. v. Henly, 48 Ohio St. 608, 29 N. E. 575; Faber v. Carlisle Mfg. Co., 126 Pa. St. 387, 17 Atl. 621; Lehigh etc. Coal Co. v. Hayes, 128 Pa. St. 294, 15 Am. St. Rep. 680, 18 Atl. 387; Ex parte Johnson, 19 S. C. 492; Gulf etc. Ry. Co. v. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706; Darracott v. Chesapeake etc. R. Co., 83 Va. 288, 5 Am. St. Rep. 266, 2 S. E. 511; Whitwam v. Wisconsin etc. R. Co., 58 Wis. 408, 17 N. W. 124; Washington etc. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.

So the fact that some appliance could be used to lessen the danger is not evidence that the defendant was not justified in using the device which he had: Hale v. Cheney, 159 Mass. 268, 34 N. E. 255. And proof that another machine is safer than the one used, is no evidence of negligence: Muirhead v. Hannibal etc. Ry. Co., 19 Mo. App. 634. See, also, Ross v. Pearson Cordage Co., 164 Mass. 257, 49 Am. St. Rep. 459, 41 N. E. 284. Of course, no negligence is shown by failure of the master to adopt a device which, so far as it appears, has not been discovered or come to be known as of practical utility: Lorimer v. St. Paul City Ry. Co., 48 Minn. 391, 51 N. W. 125. In Richards v. Rough, 53 Mich. 212, 18 N. W. 785, it is held that if a machine is sound, well made, and kept in repair, the question whether a different kind of machine would not have been safer cannot be considered.

B. Should Keep Reasonably Abreast of Modern Improvements.—This rule does not mean that an employer may wantonly risk the safety of his workmen by using old appliances and methods no longer employed in that particular business. This is well expressed in Richmond etc. R. Co. v. Jones, 92 Ala. 218, 9 South. 278, in the following words: "It is the duty of railroads to keep themselves reasonably abreast with improved methods, so as to lessen the danger attendant on the service, and while they are not required to adopt

every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances: Georgia Pac. Ry. Co. v. Propst, 83 Ala. 518, 3 South. 764. There have been such advancements in science, for the control of steam, and improvements in the machinery and appliances used by railroads, for the better security of life, limb and property, it would be inexcusable to continue the use of old methods, machinery and appliances known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, and which are in general used by well-regulated railroads. Not that it is required of them to adopt every new invention useful in the business, although it may serve to lessen danger, but it is their duty to discontinue old methods which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances: Louisville etc. Ry. Co. v. Allen, 78 Ala. 494." See to the same effect, Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611; Gulf etc. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118. In accordance with this rule it has been held negligence to run a switch engine without pilot or cow-catcher: Tennessee etc. R. Co. v. Kyle, 93 Ala. 1, 8 South. 764; and likewise, to fail to equip freight-cars with modern coupling devices: Greenlee v. Southern Ry. Co., 122 N. C. 977, 65 Am. St. Rep. 734, 30 S. E. 115; Harden v. North Carolina R. Co., 129 N. C. 354, 85 Am. St. Rep. 747, 40 S. E. 184. The failure of a railroad company to provide racks on its trains for storing guns to be used against the apprehended attacks of robbers is not negligence per se: Colorado Cent. Ry. Co. v. Martin, 7 Colo. 592, 4 Pac. 1118.

In France v. Rome etc. Co., 88 Hun, 318, 34 N. Y. Supp. 408, the court held that the best known or conceivable appliances need not be furnished, but that the test was such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances: See, also, Burke v. Witherbee, 98 N. Y. 562. That it is error to charge that appliances should be "of modern improvements and safe," see Galveston etc. R. Co. v. Gormley (Tex. Civ. App.), 27 S. W. 1051.

4. What is Ordinary Care.

A. How Determined.—It next becomes important to determine what ordinary care is, in this connection. In the first place, the employed is not to be regarded as an infant, nor the employer as his caretaker: Garnett v. Phoenix Bridge Co., 98 Fed. 192; and the latter is not obliged to take more care of the former than as a prudent man he would be expected to take care of himself: Berns v. Guston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident thereto, and the

hazard of the business in which used: Jones v. New York etc. R. Co., 22 Hun, 284. See, also, Friel v. Citizens' Ry. Co., 115 Mo. 503, 22 S. W. 498.

B. **General Custom, as a Measure Thereof.**—Custom is, therefore, of importance in determining the question of ordinary care, and in Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869, the court quotes with approval from Titus v. Railroad Co., 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517, where it is said of employers: "They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in the employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the community." And see Chicago etc. Ry. Co. v. Armstrong, 62 Ill. App. 228. The same idea is expressed in Keller v. Schwenk, 144 Pa. St. 348, 27 Am. St. Rep. 633, 22 Atl. 910, and Dooner v. Delaware etc. Canal Co., 171 Pa. St. 581, 33 Atl. 415, where it is held that the duty of the master is to furnish machinery of ordinary character and reasonable safety, and the former is the conclusive test of the latter. See, also, Bohn v. Chicago etc. Ry. Co., 106 Mo. 429, 17 S. W. 580; Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821. If negligence is customary, it is, however, no excuse: Hosic v. Chicago etc. Ry. Co., 75 Iowa, 683, 9 Am. St. Rep. 518, 37 N. W. 963. "The usual custom or practice of railroad corporations in operating their roads, and constructing their machinery and buildings, cannot be the ground of relief from liability for injuries sustained, if the custom or practice disregards the safety of the employés, as required by the law. In that case, it would simply be nothing more than negligence practiced habitually by the corporations": Allen v. Burlington etc. Ry. Co., 64 Iowa, 94, 19 N. W. 870.

It is proper to exclude evidence of what could have been used as an appliance, but not amounting to proof that it was in general use: McCarthy v. Boston Duck Co., 165 Mass. 165, 42 N. E. 568. So where an attachment is not in general use, and there is no general agreement among men engaged in that business that it is desirable or useful, failure to use it is not negligence, and should not be left to the jury: Delaware etc. Shipbuilding Co. v. Nuttall, 119 Pa. St. 149, 13 Atl. 65. But where there is contradictory testimony, the

question as to whether an appliance is unsafe or unfit for use is for the jury: Richmond etc. R. Co. v. Weems, 97 Ala. 270, 12 South. 186.

C. **Risks to be Apprehended.**—The danger to be apprehended from the machine or appliance is also to be taken into consideration in determining the question of reasonable care, and it has been held that where the risk from appliances is small, the use of very primitive and inefficient implements is allowable, and such use will fill the measure of ordinary care: Steinhauser v. Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102.

5. **Animals as Instrumentalities for Work.**—The rule regarding the furnishing of safe appliances by a master to his servant applies as well to animate as inanimate instrumentalities, and he is liable for injuries caused by negligently or knowingly supplying a vicious and dangerous animal with which his servant is to perform his allotted work: Cooper v. Robert Portner Brewing Co., 112 Ga. 894, 38 S. E. 91 ;East Jellico Coal Co. v. Stewart, 24 Ky. Law Rep. 420; 68 S. W. 624; Geo. H. Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967.

b. **Duty to Repair.**

1. **Must Use Reasonable Diligence.**—Equally important with the duty of supplying reasonably safe and suitable appliances in the first instance is that of maintaining them in such condition and making all necessary repairs, for such duty is a continuing one, rendering the master liable for negligence for failure so to do, he being held to the exercise of reasonable diligence in this respect: Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Boyd v. Blumenthal, 2 Penne. (Del.) 564, 52 Atl. 330; Nord Deutscher etc. S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619; Illinois Cent. R. Co. v. Barslow, 55 Ill App. 203; Pullman Pal. Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Ohio etc. Ry. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Shebek v. National Cracker Co., 120 Iowa, 414, 94 N. W. 930; Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; Atchison etc. R. Co. v. Napole, 55 Kan. 401, 40 Pac. 669; Clay City etc. Co. v. Noe, 25 Ky. Law Rep. 668, 76 S. W. 195; Budge v. Morgan's etc. S. S. Co., 108 La. 349, 32 South. 535; Hewitt v. Flint etc. R. Co., 67 Mich. 61, 34 N. W. 659; Miller v. Great Northern Ry. Co., 85 Minn. 272, 88 N. W. 758; O'Mellia v. Kansas City etc. R. Co., 115 Mo. 205, 21 S. W. 503; Nichols v. Chrystal etc. Glass Co., 126 Mo. 55, 28 S. W. 991; Scandell v. Columbia Const. Co., 50 App. Div. 512, 64 N. Y. Supp. 232; Duntley v. Inman etc. Co, 42 Or. 334, 70 Pac. 529; Finnerty v. Burnham, 205 Pa. St. 305, 54 Atl. 996; Hill v. Southern Pac. Co., 23 Utah, 94, 63 Pac. 814; The Edith Godden, 23 Fed. 43.

2. **Must have Opportunity to Repair.**—Before an employer can be charged with negligence in failing to keep his appliances in suitable condition, he is entitled to actual or constructive notice of the want

of repairs, and a reasonable opportunity to make them: Indianapolis etc. R. Co. v. Flanigan, 77 Ill. 365; Kerrigan v. Chicago etc. Ry. Co., 86 Minn. 407, 9 N. W. 976. That mere knowledge, without an opportunity to act on it, would not constitute negligence, see United States Rolling Stock Co. v. Weir, 96 Ala. 396, 11 South. 436; Seaboard Mfg. Co. v. Woodson, 98 Ala. 378, 11 South. 733; Pavey v. St. Louis etc. R. Co., 85 Mo. App. 218.

If there is no time to make the required repairs, the master should warn his employés: Denver etc. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681. See, also, Rice v. King Phillip Mills, 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101.

If a railroad company furnishes its servants with a sufficient supply of suitable links for connecting its cars, it is not bound to keep the links used in proper condition, or to prevent the use of dangerous or unsuitable links: Miller v. New York etc. R. R., 175 Mass. 363, 56 N. E. 282.

c. Duty to Inspect.

1. **Necessity Therefor.**—The duty of a master to his servant does not stop with repairing such defects as may have been brought to his notice, but he must make careful inspections from time to time to test the continued soundness of his machinery and appliances, and his failure to do so is negligence, rendering him liable in damages for all injuries caused thereby: Nord Deutscher etc. S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619; Finnerty v. Burham, 205 Pa. St. 305, 54 Atl. 996; Galveston etc. Ry. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066; Galveston etc. Ry. Co. v. Buch, 27 Tex. Civ. App. 283, 65 S. W. 681; Paine v. Eastern Ry. Co., 91 Wis. 340, 64 N. W. 1005; Lafayette Bridge Co. v. Olson, 108 Fed. 335, 47 C. C. A. 367. "Negligence on the part of the corporation," says the court in Brann v. Chicago etc. R. Co., 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5, "may consist of acts of omission or commission, and it necessarily follows that the continuing duty of supervision and inspection rests on the corporation. For it will not do to say that having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continually fulfilled and positively performed. In ascertaining whether this has been done or not the character of the business should be considered, and anything short of this would not be ordinary care." To the same effect, see Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

If special occasion arise in which an inspection would be reasonable, failure to make one is negligence. So where a collision occurred between an engine and a train of cars, and no inspection was made, and a short time after a coupling-pin connecting the engine and tender broke, resulting in the death of a fireman thereon, failure to inspect the coupling-pin after it had been subjected to the strain

in the collision was held to render the company liable: Norfolk etc. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367.

In the case of a railroad, it is held that ordinary care in inspecting the locomotives and cars is required, and not a system of inspection that would embarrass the operation of the road: Smoot v. Mobile etc. Ry. Co., 67 Ala. 13. But evidence that care used in inspection is that usually exercised by a railway company is not conclusive upon the proposition that due care has been used: Atchison etc. R. Co. v. Kingscott, 65 Kan. 131, 69 Pac. 184.

2. **Common and Ordinary Tools.**—An exception to the rule requiring inspection exists in the case of common tools, in every-day use, in which case the servants themselves using them may readily discover the defects: Miller v. Erie R. Co., 21 App. Div. 45, 47 N. Y. Supp. 285. See, also, Wachmuth v. Shaw Elec. Crane Co., 118 Mich. 275, 76 N. W. 497. It is for the servant to show that an inspection would have revealed the defect causing the injury: Sack v. Dolese, 137 Ill. 129, 27 N. E. 62; South Baltimore Car Works v. Schafer, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665.

3. **Where Appliances are Bought of Reputable Dealers.**—An interesting question arises as to how far employers must go in the matter of inspection where they have bought the appliances or material from which they were made, of reputable manufacturers or dealers. In Morton v. Detroit etc. R. Co., 81 Mich. 423, 46 N. W. 111, it was held that they are not absolved from the duty of testing or inspection on that account, and that if any defect exists which a careful inspection would have discovered, the master will be liable. Ordinary care in inspecting does not require that a locomotive, bought of a reputable dealer, should be taken apart to examine it: Clyde v. Richmond etc. R. Co., 65 Fed. 482.

In Carlson v. Phoenix Bridge Co., 132 N. Y. 273, 30 N. E. 750, affirming 55 Hun, 485, 8 N. Y. Supp. 634, an employer purchased of a reputable dealer a quantity of the best grade of iron in the market, and had a blacksmith in his own employ convert it into hooks, one of which broke while being used to raise an iron girder, injuring one of the employés. It was held that no liability attached to the master, the court saying: "A master who puts a tool or implement into his servant's hand may procure it in several ways. He may buy it ready made of a dealer, procure it to be manufactured, or purchase the materials and manufacture it himself. Liability for an injury resulting from a defect in the materials of a tool will be determined by the same rule in each case. If a hook like the one used in the present case had been procured ready made in the market or manufactured at a foundry, the defendant would necessarily have been compelled to rely upon the dealer and manufacturer for the quality of materials used. A completed hook ready for use could

neither be cut into with a chisel, or bent over an anvil, without impairing its strength, or perhaps destroying it altogether. A test of that character applied to one of a lot would be no guaranty of the quality of the others. To apply such a test, therefore, to tools procured in that way is impracticable, and such articles are not usually tested before they are put in use. The modern industrial system rests upon confidence in others. A railroad corporation cannot well apply such tests to the materials of which its cars and engines are made, or to the rails which form its tracks. Reasonable inspection is necessary and required. But when articles are manufactured by a process approved by use and experience, and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law."

If an appliance is purchased from a reputable dealer and subsequently gets out of order and is repaired by servants of the master, a failure to make a reasonable inspection, which would have disclosed the defect therein, renders the employer liable to one of his workmen injured thereby: Kansas City etc. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292.

d. **Duty to Guard or Inclose Dangerous Machinery.**—Cases have arisen in which, while the machinery itself was in good working order, accidents have occurred through failure to guard or inclose it. It has been held not negligence per se to omit to cover dangerous machinery; that the question of negligence depends upon the circumstances of each case, such as the nature of the employment, the degree of exposure to danger, and notice thereof to the employé: Carroll v. Williston, 44 Minn. 287, 46 N. W. 352; nor is a machine in perfect working order to be considered defective because the cog-wheels in plain sight are not covered, although the accident would not have happened if it had been: Wilson v. Massachusetts Cotton Mills, 169 Mass. 67, 47 N. E. 506. See, also, Sullivan v. India Mfg. Co., 113 Mass. 396; Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401. The master is not liable for failing to put a guard in front of his machine, where it was one of the best pattern, in good working order, and no guard was intended to be used on such machine: Arizona Lumber etc. Co. v. Mooney (Ariz.), 42 Pac. 952. And in Sanborn v. Atchison etc. R. Co., 35 Kan. 229, 10 Pac. 860, it was held not negligence to omit to fence cog-wheels, where the person oiling the machine, who was injured while attempting to do so, could stop it by a simple operation, and it was not customary to guard such machines. Failure to guard a usually uninclosed machine can become negligence only if the servant is so inexperienced that he should have been given special instructions concerning its use, and they were not given: Reese v. Hershey, 163 Pa. St. 253, 43 Am. St. Rep. 795, 29 Atl. 907.

Such failure may, however, become negligence: Reichla v. Gruensfelder, 52 Mo. App. 43. So where an employer leaves unprotected a large, rapidly revolving cog-wheel, in which iron and tongs are liable to be caught, broken to pieces, and hurled about the room with such force as to kill a person, and he is warned to inclose it, so as to prevent this danger, he is liable for injury to an employé happening in the above manner: Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890. See, also, Mastin v. Levagood, 47 Kan. 36, 27 Am. St. Rep. 277, 27 Pac. 122, 47 Kan. 764, 28 Pac. 977.

Evidence is admissible that guards are not in general use in the business, and that the same kind of machine without a guard had been operated in another factory where the injured employé had been employed: Rees v. Hershey, 163 Pa. St. 253, 43 Am. St. Rep. 795, 29 Atl. 907. The fact, however, that other parties have never taken certain precautions to prevent injury to their servants is not conclusive evidence that another is not guilty of negligence in failing to provide proper safeguards in respect to his machine: McCormick etc. Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. 588.

e. **Explosives.**—From the danger attendant upon the use of explosives, a high degree of care is required of employers toward their employés in all matters in which such explosives must be used; and Justice Field, in the case of Mather v. Billston, 156 U. S. 391, 15 Sup. Ct. Rep. 464, lays it down as a legal principle that in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence.

So it is gross negligence to furnish to a workman an untested and unusual explosive, without giving him any information in that regard: Spelman v. Fisher Iron Co., 56 Barb. 151. The more dangerous the instrument employed, the more care should be taken to obtain as safe an article as possible; and a master has no right to purchase explosives which are more dangerous and liable to explode, simply because they can be obtained more cheaply: Adams v. West Roxbury, 1 Hask. 576, Fed. Cas. No. 67.

Where the very best kind of explosives are purchased, the employer need make no inspection of them, as they are manufactured with a view to rendering inspection unnecessary, and it could not be effectively made unless a skilled expert were employed, possessed of the mechanical and chemical knowledge involved in the manufacture thereof: Shea v. Wellington, 163 Mass. 364, 40 N. E. 173.

f. **Effect of Delegation of Duty to Supply, Repair, or Inspect by Master, to Another**—One of the most widely recognized doctrines arising under the laws pertaining to master and servant is that in accepting employment the latter takes upon himself the negligence

of his coemployés, and, if injured thereby, cannot hold the master responsible in damages. The question then naturally presents itself that if one is injured by the negligence of another, in the employment of the same master, in failing to supply, repair, or inspect the machinery or appliances, is such to be considered the negligence of a fellow-servant or of the master. This question is of controlling importance, for if it be regarded as the former, there can be no recovery; if the latter, there can. The weight of authority holds that it is the duty of the master to exercise reasonable diligence in furnishing his servants with proper appliances, keeping them in repair, and inspecting them; and that this duty cannot be delegated to another so as to relieve the master of liability for failure therein, such person not being considered as a fellow-servant, but as the agent and representative of the master, no matter what his rank or position may in fact be to the injured employé: Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Herbert v. Northern Pac. R. Co., 3 Dak. 38, 13 N. W. 349; Ray v. Diamond State Steel Co., 2 Penne. (Del.) 525, 47 Atl. 1014; Chicago etc. R. Co. v. Sullivan, 63 Ill. 293; Tudor Iron Works v. Weber, 31 Ill. App. 306, affirmed 129 Ill. 535, 21 N. E. 1078; Monmouth Min. etc. Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117, affirming 45 Ill. App. 411. Krueger v. Louisville etc. Ry. Co., 111 Ind. 51, 11 N. E. 957; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Hammond etc. v. Mason, 12 Ind. App. 469, 40 N. E. 642; Atchison etc. R. Co. v. Kingscott, 65 Kan. 131, 69 Pac. 184; Clay City etc. Co. v. Noe, 25 Ky. Law Rep. 668, 76 S. W. 195; Morton v. Detroit etc. R. Co., 81 Mich. 423, 46 N. W. 111; Bridges v. St. Louis etc. R. Co., 6 Mo. App. 389; Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Bushby v. New York etc. R. Co., 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407, affirming 37 Hun, 104; Nichols v. Brush etc. Mfg. Co., 53 Hun, 137, 6 N. Y. Supp. 601, affirmed 117 N. Y. 646, 22 N. E. 1131; Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408; Lewis v. Seifert, 116 Pa. St. 628, 2 Am. St. Rep. 631, 11 Atl. 514; Trainor v. Philadelphia etc. R. Co., 137 Pa. St. 148, 20 Atl. 632; Lasure v. Graniteville Mfg. Co., 18 S. C. 275; International etc. R. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668; Chapman v. Southern Pac. Co., 12 Utah, 30, 41 Pac. 551; Norfolk etc. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Hough v. Texas etc. Ry. Co., 100 U. S. 213; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590; Northern Pac. R. Co. v. Pairier, 67 Fed. 881, 15 C. C. A. 52, 29 U. S. App. 583. And the same rule has been applied to an independent contractor, hired by the master, the negligence of the former not relieving the latter of his duty to keep the appliance in a good condition. Toledo Brewing etc. Co. v. Bosch, 101 Fed. 530, 41 C. C. A. 482.

In Nord Deutscher etc. S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619, the court said: "In determining whether an employé, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow-servant of the latter engaged in a common employment, many incongruous decisions have been rendered.

"On this topic a rational distinction would seem to be, that when the employé's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that if the master has cast a duty of inspection or repair upon an employé who is not engaged in using the apparatus in a common employment with his fellow-servant, then that employé in that duty represents the master, and the master is chargeable with his default. This distinction is noticeable in McAndrews v. Burns, 39 N. J. L. 117; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Collyer v. Pennsylvania Co., 49 N. J. L. 59, 6 Atl. 437; Ross v. Walker, 139 Pa. St. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; Moynihan v. Hills Co., 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574; Daley v. Boston etc. R. R. Co., 147 Mass. 101, 16 N. E. 690, and many other cases."

In Little Rock etc. R. Co. v. Moseley, 56 Fed. 1009, 6 C. C. A. 225, 12 U. S. App. 514, a railroad company was held liable to one of its employés for failure of its inspector to examine a coupling link properly, whereby the injury was caused. The refusal of the trial court to charge that the injured workman and the inspector were fellow-servants, and that the former could not recover if the injuries were caused by failure of the latter to make a proper inspection was assigned as error. The following authorities were cited in support of the assignment: Mackin v. Railroad Co., 135 Mass. 201, 46 Am. Rep. 456; Keith v. Northampton Co., 140 Mass. 175, 3 N. E. 28; Byrnes v. Railroad Co., 113 N. Y. 251, 21 N. E. 50; Philadelphia etc. R. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Wonder v. Railroad Co., 32 Md. 411, 3 Am. Rep. 143; Columbus etc. R. R. Co. v. Webb, 12 Ohio St. 475; St. Louis etc. R. R. Co. v. Gaines, 46 Ark. 555; Smith v. Potter, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; Smoot v. Railway Co., 67 Ala. 13. While admitting that most of those authorities fully supported the doctrine contended for, the court held that there was no error in refusing to charge as requested, holding that the master is responsible for the negligence of his inspector. And see Schulz v. Rohe, 149 N. Y. 132, 43 N. E. 420, holding that the negligence of an engineer, employed to keep machinery in order, to repair a defect which he had been directed to remedy, is the negligence of a fellow-servant, as regards the injured employé.

The duty of a master to inspect machinery does not extend to the cleaning and oiling thereof, which are mere details of the work, and hence can be delegated to another: Quigley v. Levering, 167 N. Y. 58, 60 N. E. 276, affirming 50 App. Div. 354, 63 N. Y. Supp. 1059.

g. Where the Servant is Employed to Repair Defective Machinery.—The rule that a master must provide reasonably safe appliances to his servants, does not apply where the servant is himself employed by the master to repair the defect, and had, theretofore, repaired it: Kleine v. Freunds etc. Co., 91 Mo. App. 210. In Dartmouth Spinning Co. v. Achard, 84 Ga. 14, 10 S. E. 449, it is said: "While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe while repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired."

II. Knowledge of Defect by the Master.

a. Actual or Constructive Notice Necessary.—Personal negligence or want of care is the gist of actions for injuries received by a servant from the use of defective appliances: Flynn v. Beebe, 98 Mass. 575; Devlin v. Smith, 87 N. Y. 470, 11 Abb. N. C. 322, 42 Am. Rep. 311, reversing 25 Hun, 206; and no culpability can arise if there be no knowledge of the defect, or negligence in not acquiring such knowledge, on the part of the master. It may therefore be stated as the law, that if the master knew, or could, in the exercise of ordinary care, have known, of the defective condition of his machinery or tools, he is liable; otherwise, he is not: Mobile etc. R. Co. v. Thomas, 42 Ala. 672; Brymer v. Southern Pac. Co., 90 Cal. 496, 27 Pac. 371; Indianapolis etc. R. Co. v. Flanigan, 77 Ill. 365; East St. Louis etc. Co. v. Hightower, 92 Ill. 139; Baltimore etc. R. Co. v. Greer, 103 Ill. App. 448; Pennsylvania Co. v. Congdon, 134 Ind. 226, 39 Am. St. Rep. 251, 33 N. E. 795; Chicago etc. R. Co. v. Blevins, 46 Kan. 370, 26 Pac. 687; Carruthers v. Chicago etc. Ry. Co., 55 Kan. 600, 40 Pac. 915; Nichols v. Chrystal etc. Glass Co., 126 Mo. 55, 28 S. W. 991; Bullmaster v. City of St. Joseph, 70 Mo. App. 60; Smith v. Gulf etc. Ry. Co. (Tex. Civ. App.), 65 S. W. 83; Norfolk etc. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Jones v. Yeager, 2 Dill. 64, Fed. Cas. No. 7510. That ignorance by the master is no defense, if ordinary care would have discovered the defect, or in other words, that constructive knowledge is equivalent to actual, see Ocean S. S. Co. v. Mathews, 86 Ga. 418, 12 S. E. 632; Pioneer Cooperage Co. v. Romanowicz, 85 Il. App. 407; affirmed 86 Ill. 9, 57 N. E. 864; Lake Erie etc. R. Co. v. McHenry, 10 Ind. App. 525, 37 N. E. 186; Reber v. Tower, 11 Mo. App. 199; Herbert v. Mound City etc. Co., 90 Mo. App. 305; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222.

It was held in Little Rock etc. R. Co. v. Duffey, 35 Ark. 602, that the fact that the master might have known by ordinary care that a tool was defective did not make him liable for injury resulting therefrom, irrespective of any probability of harm or danger in using it. But see Union Showcase Co. v. Blindauer, 75 Ill. App. 358.

From the fact that the defect was open to observation and had existed for a considerable time, the master's knowledge thereof may be inferred: Bridges v. St. Louis etc. R. Co., 6 Mo. App. 389. The master must also take notice that tools and machinery wear out, and are liable to decay, and to this end must make frequent inspections: Chicago etc. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Baltimore etc. Ry. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854; Atchison etc. R. Co. v. Holt, 29 Kan. 149.

The fact that an inspection is made and the material is found suitable does not relieve the master from the duty of remedying a defect subsequently brought to his notice: Indiana etc. Ry. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912, the court saying: "An inspection is but the means employed by the master to discover defects. However, if, as in this case, he obtains notice through another representative agency of the insufficiency of the appliances in time to remedy the same, then the fact that an inspection was made by another of his agents and nothing as to the defectiveness in question ascertained, would not be available in favor of the master. Where there is actual knowledge, the matter of inspection is not controlling." Notice of want of repair must be proved and will not be inferred: Chicago etc. R. Co. v. Merriman, 95 Ill. App. 628.

b. **Notice to What Servants will Bind the Master.**—Notice of the defect need not be brought home to the master personally, but if it be known by an agent of his, intrusted with the duty of procuring and keeping in repair the machinery, it will be deemed the master's knowledge: Dedrick v. Missouri Pac. Ry. Co., 21 Mo. App. 433. Accordingly, the master has been held to have had knowledge, where notice has been given a foreman or yardmaster in charge: Ray v. Diamond State Steel Co., 2 Penne. (Del.) 525, 47 Atl. 1017; Boyd v. Blumenthal, 3 Penne. (Del.) 564, 52 Atl. 330; Falkenan v. Abrahamson, 66 Ill. App. 352; Union Bridge Co. v. Teehan, 92 Ill. App. 259, affirmed 190 Ill. 374, 60 N. E. 533; Ohio etc. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246; Lyttle v. Chicago etc. Ry. Co., 84 Mich. 289, 47 N. W. 571.

Notice of the existence of a defect to a fellow-servant is not, however, sufficient to charge the master: Smoot v. Mobile etc. Ry. Co., 67 Ala. 13; Chicago etc. R. Co. v. Merriman, 95 Ill. App. 628. Where, therefore, the jury was instructed that a railroad company was liable for injuries caused by defective machinery if any of its servants knew of the defect, it was held error, as it would be liable

only for the knowledge of those whose duty it was to see that it was kept in a reasonably safe condition and state of repair: St. Louis etc. Ry. Co. v. Threat, 12 Tex. Civ. App. 375, 34 S. W. 152.

III. Latent Defects.

Being held only to the exercise of ordinary care, an employer is not held liable for injuries arising from latent defects, not known to him and not discoverable by a proper inspection: Louisville etc. R. Co. v. Allen, 78 Ala. 494; Louisville etc. R. Co. v. Campbell, 97 Ala. 147, 12 South. 574; Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Baxley v. Satilla Mfg. Co., 114 Ga. 720, 40 S. E. 730; Sanden v. Bannon, 85 Ill. App. 17; Louisville etc. Ry. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; Chestnut v. Southern Indiana Ry. Co., 157 Ind. 509, 62 N. E. 32; Louisville etc. R. Co. v. Hinder, 16 Ky. Law Rep. 841, 30 S. W. 399; Spicer v. South Boston Iron Co., 138 Mass. 426; Attix v. Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436; Probst v. Delamater, 100 N. Y. 266, 3 N. E. 184; McAvoy v. Pennsylvania Woolen Co., 140 Pa. St. 1, 21 Atl. 246; Galveston etc. Ry. Co. v. Buch, 27 Tex. Civ. App. 283, 65 S. W. 681; The Flowergate, 31 Fed. 762. That the master is not liable for hidden flaws where the appliance was bought from an experienced and reputable dealer, see Roughan v. Boston etc. Block Co., 161 Mass. 24, 36 N. E. 461; Doyle v. White, 159 N. Y. 548, 54 N. E. 1090; affirming 9 App. Div. 521, 35 N. Y. Supp. 760, 41 N. Y. Supp. 628.

If, however, he had knowledge, or could by reasonable diligence, have acquired it, he is liable for a latent defect: Carroll v. Tidewater Oil Co., 67 N. J. L. 679, 52 Atl. 275.

For a simple tools in every day use, such as hammers, the master is liable only for obvious defects: Martin v. Highland Park Mfg. Co., 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876.

IV. Structural Defects.

Where a defect is in the original construction by the master, no notice thereof need be brought home to him: Crown Coal Co. v. Hiles, 43 Ill. App. 310; Illinois Cent. R. Co. v. Harris, 53 Ill. App. 592; Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128; Finnerty v. Burnham, 205 Pa. St. 305, 54 Atl. 996. He need, however, use only due care in constructing his appliances: St. Louis etc. Ry. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591.

V. Where Employes are to Adjust, Choose, or Furnish Appliances Themselves.

In Burns v. Sennett, 99 Cal. 363, 33 Pac. 916, after stating the rule that an employer cannot escape liability for the nonperformance of a duty owing his employés by delegating it to another, the court proceeds: "While the general rule is as above stated, still it is well established that the rule does not apply to a case where several per-

sons are employed to do certain work, and by the contract of employment, either express or implied, the employés are to adjust the appliances by which the work is to be done. For instance, if several men are employed to paint a building or to do some work upon it which requires scaffolding, or some other temporary structure or appliance to support the workmen—the employer to furnish the materials and the employed to construct or adjust the scaffolding or other appliance—the employer is not liable to one of the employés for the careless act of another employé done in the construction, adjustment, or maintenance of the structure or appliance. There are many cases establishing and illustrating this principle and applying it to a variety of facts, a few of which are the following: Peschel v. Chicago etc. Ry. Co., 62 Wis. 338, 21 N. W. 269; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Killea v. Faxon, 125 Mass. 485; Ross v. Walker, 139 Pa. St. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; Benn v. Null, 65 Iowa, 407, 21 N. W. 700; Bowen v. Chicago etc. Ry. Co., 95 Mo. 28, 8 S. W. 230." See, also, Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199.

Where the master supplies a sufficient quantity of suitable material, the duty of selection therefrom devolves upon the servant, and the master is not liable: Moore v. McNeill, 35 App. Div. 323, 54 N. Y. Supp. 956. And see Carroll v. Western Union Tel. Co., 160 Mass. 152, 35 N. E. 456. Or it may be that the servant is left to procure the instrumentalities with which he is to work himself: Robinson v. Blake Mfg. Co., 143 Mass. 528, 10 N. E. 314, the court using the following language: "It is not a universal rule of law that an implied duty rests upon an employer to furnish suitable means, machines, implements, and instrumentalities for doing his work. This may depend on the nature of the employment and the circumstances of the case. The natural inference from these might be that the servant or person employed was to furnish his own tools and appliances. Or the nature of the work to be done might be such that it would be natural and reasonable to infer that both parties understood that the servant should procure whatever might prove to be needed, according to his own judgment, as a part of his employment. If a person is employed to do a piece of work himself, with the understanding that he shall procure such means, materials, or implements as he finds to be needed, and if he enters upon the execution of the work and procures insufficient or defective means, materials, or implements, it might be found that the master did not assume any responsibility to such servant for their sufficiency or quality, even though he was to pay for them."

VI. Liability of a Railroad Company for Defects on Cars of Other Companies upon Its Line.

In a number of states, either by statutory or constitutional provision, railroad companies are obliged to transport over their own

lines the cars of other companies. The question of the liability of the company owning the roadbed for defective cars and appliances thereon belonging to foreign companies, causing injury to its own employés, has arisen frequently, and the law is well settled in this respect. As is said in Elkins v. Pennsylvania R. Co., 171 Pa. St. 121, 33 Atl. 74: "It is not the ownership of the cars or of the line on which they are moved that imposes the liability upon the company, but it is the handling or shipping of them by its orders": See, also, St. Louis etc. Ry. Co. v. Valirius, 56 Ind. 511; Texas etc. Ry. Co. v. McClanahan (Tex.), 2 Posey U. C. 270.

The rule in regard to inspecting foreign cars is thus laid down: That when one company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition, such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employés required to handle the car; and, when such defects are patent and an injury occurs to the employés by reason of the defect that is unknown to the party injured, the company is responsible: Louisville etc. R. Co. v. Williams, 95 Ky. 199, 44 Am. St. Rep. 214, 24 S. W. 1. That the duty of such inspection is incumbent upon the company receiving the cars, is established by the following authorities: Chicago etc. Ry. Co. v. Armstrong, 62 Ill. App. 228; Illinois Cent. R. Co. v. Barshow, 94 Ill. App. 206; Missouri Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. 969; Budge v. Morgan's etc. S. S. Co., 108 La. 349, 32 South. 535; Keith v. New Haven etc. R. Co., 140 Mass. 175, 3 N. E. 28; Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 South. 415; Bender v. St. Louis etc. Ry. Co., 137 Mo. 240, 37 S. W. 132; Gottlieb v. New York etc. R. Co., 100 N. Y. 462, 3 N. E. 344; Goodrich v. New York etc. R. Co., 116 N. Y. 398, 15 Am. St. Rep. 410, 22 N. E. 397; Leak v. Carolina Cent. R. Co., 124 N. C. 455, 32 S. E. 884; Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408; International etc. R. Co. v. Kernan, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063; Jones v. Shaw (Tex.), 41 S. W. 690; Baltimore etc. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. Rep. 491.

The fact that such cars are to be used only for a brief time or carried a short distance will not excuse a failure to inspect them: Atchison etc. R. Co. v. Penfold, 57 Kan. 148, 45 Pac. 574. Nor can it devest itself of this duty toward its employés by a contract with the companies whose cars are used that the latter shall keep them in repair: Chicago etc. R. Co. v. Avery, 109 Ill. 314.

The inspection required is only a reasonable one, and it need not make tests to discover defects in the construction or in the materials used therein: Gutridge v. Missouri Pac. Ry. Co., 94 Mo. 468, 4 Am. St. Rep. 392, 7 S. W. 476; Ballou v. Chicago etc. Ry. Co., 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559.

A railroad company need not receive and haul cars of another company which are so defective as to imperil the life or limb of an employé: Texas etc. Ry. Co. v. Carlton, 60 Tex. 397; and is under the same obligation to furnish safe appliances, whether the cars belong to it or to a connecting line: St. Louis etc. Ry. Co. v. Putnam, 1 Tex. Civ. App. 142, 20 S. W. 1002. See, also, Louisville etc. R. Co. v. Davis, 91 Ala. 487, 8 South. 552. It is not, however, negligence for one company to transport the cars of another, which may not be constructed with the most approved appliances: Baldwin v. Chicago etc. R. Co., 50 Iowa, 680.

From the very nature of the case, it is not to be expected that the appliances used by the different railroads will be of the same kind. Hence, it is not negligence per se for such company to receive foreign cars upon its own tracks with different styles of couplings from those used on its own cars, and which increase the hazard of coupling: Louisville etc. R. Co. v. Boland, 96 Ala. 626, 11 South. 667; Thomas v. Missouri Pac. Ry. Co., 109 Mo. 187, 18 S. W. 980; Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. Rep. 298; nor is it authorized to refuse to transport cars because they have an old style pattern of bumpers, where the duty of receiving them is enjoined by law: Simms v. South Carolina Ry. Co., 26 S. C. 490, 2 S. E. 486. See, also, Northern Pac. R. Co. v. Blake, 63 Fed. 45, 11 C. C. A. 93, 27 U. S. App. 190.

The question as to how far it was negligence to receive cars differing in height from its own was discussed in Norfolk etc. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496, the court saying: "To hold that a railroad company was negligent in supplying safe and suitable machinery to its servants unless every car in a train was of the same height, would, in our opinion, be requiring an extraordinary degree of care on its part. The effect of such a requirement would be to compel such company to have all its own cars changed to or made the same height, or to have only cars of the same height placed in the same train. It would also be required to have the railroad companies whose cars pass over its line make their cars of the same height, or put only those of the same height in the same train, or transfer all freight at its terminal points to other cars, or cease to do business with connecting lines.

"Such a rule would be impracticable as well as expensive and burdensome to the railroad company, and would require the company to exercise not reasonable, but extraordinary care in supplying and maintaining suitable machinery and instrumentalities to its servants in the performance of the work required of them, and that too, when the defect complained of was obvious and patent, and could be seen as easily by them as by the master."

VII. Independent Contractors.

Where a master does not use reasonable care in furnishing appliances to a contractor, engaged in performing work for him, he is liable to servants of the contractor for injuries caused thereby: McCall v. Pacific Mail S. S. Co. (Cal.), 55 Pac. 706. It is there said: "The rule is too firmly settled to be open to successful attack, that, where one agrees to furnish to a contractor material or appliances which he is to use in the performance of his task, the principal is liable to the servants and agents of the contractor for injuries which may result to them from his negligence or inadequate performance of his contract in this regard. The liability is not based upon the relationship of employer and employé, but it is considered by some courts that the contract is made with the contractor for the benefit of his employés, who have, therefore, their right to a recovery for any breach of it which results in their injury. By other courts the contractor is considered to be the dependent agent of his employer in these respects, and the doctrine of respondeat superior is brought into application. By still others it is placed upon the ground of the failure of the principal to exercise the ordinary care which is due to everybody, without regard to contract, ... and this seems to be the true reason for the rule.

"But, however that may be, the principle itself is settled beyond the possibility of successful controversy. Mechem on Agency, section 666, thus declares the doctrine: 'If the principal was by the terms of the contract under obligations to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, he would be liable to the servant or agent of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and supplying the proper machinery or appliances.' In further support of the principle may be cited the cases of Mulchey v. Society, 125 Mass. 487; Lee v. Railway Co., 116 Cal. 97, 58 Am. St. Rep. 40, 47 Pac. 932; McKenna v. The Carolina, 30 Fed. 199; Coughlan v. The Rheola, 19 Fed. 926; Hamilton v. The Wm. Branfoot, 48 Fed. 914; Roddy v. Missouri etc. Ry. Co., 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 1112; Steel v. McNeil, 60 Fed. 105, 8 C. C. A. 512; Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 423; Kelly v. Howell, 41 Ohio St. 438; Coughtry v. Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387." See in addition, Delvin v. Smith, 89 N. Y. 470, 11 Abb. N. C. 322, 42 Am. Rep. 311.

The fact that a car is furnished a quarry owner by a railroad company does not relieve him from liability for injuries caused by a defect therein, even though he is obliged to take whatever car is furnished him: Spaulding v. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134. But in Anderson v. Oliver, 138 Pa. St. 156, 20 Atl. 981, a laborer at a furnace was injured while unloading a railroad

car in the course of his employment, it being owned by a railway company and having been delivered by it at the furnace in a defective condition. The master was held not liable for the defect, as he did not own the car and had no control over it further than to unload it.

VIII. Care Required of the Servant.

a. **Reasonable Care.**—Thus far we have discussed the duty of the master to his servant in matters dealing with the use of defective machinery. It now becomes necessary to determine what duty is incumbent upon the servant in regard thereto, for, as already remarked, the latter is not to be regarded as an infant and the former as his guardian: Garnett v. Phoenix Bridge Co., 98 Fed. 192.

The care to be used by an employé, like that of an employer, depends on the circumstances of each particular case, each being held to reasonable care: Denver etc. R. Co. v. Simpson, 16 Colo. 55, 25 Am. St. Rep. 242, 26 Pac. 339; Leak v. Carolina Cent. R. Co., 124 N. C. 455, 32 S. E. 884; Horton v. Ft. Worth etc. Co. (Tex. Civ. App.), 76 S. W. 211.

b. **May Assume that Machinery is Safe and Suitable.**—The general rule undoubtedly is that the servant has a right to assume, in the absence of knowledge to the contrary, that the master has performed his duty in providing and maintaining reasonably safe and suitable machinery, and hence is under no obligation to inspect the machine for hidden defects: Monmouth Min. etc. Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117, affirming 45 Ill. App. 411; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818; Louisville etc. Ry. Co. v. Buck, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. 453; Louisville etc. Ry. Co. v. Howell, 147 Ind. 266, 45 N. E. 584; Clay City etc. Co. v. Noe, 25 Ky. Law Rep. 668, 76 S. W. 195; Wuotilla v. Duluth Lumber Co., 37 Minn. 153, 5 Am. St. Rep. 832, 33 N. W. 551; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Banks v. Wabash W. Ry. Co., 40 Mo. App. 458; Franklin v. Missouri etc. Ry. Co., 97 Mo. App. 473, 71 S. W. 540; Cole v. Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Pierson v. New York etc. R. Co., 53 App. Div. 363, 65 N. Y. Supp. 1039; Darling v. New York etc. R. Co., 17 R. I. 708, 24 Atl. 462; Guthrie v. Louisville etc. R. Co., 79 Tenn. (11 Lea) 372, 47 Am. Rep. 286; Galveston etc. Ry. Co. v. Edmunds (Tex. Civ. App.), 26 S. W. 633; Gulf etc. R. Co. v. Kelly (Tex. Civ. App.), 34 S. W. 140; Galveston Ry. Co. v. Smith (Tex. Civ. App.), 57 S. W. 999; Norfolk etc. R. Co. v. Nunnally, 88 Va. 546, 14 S. E. 367. In Bradbury v. Goodwin, 108 Ind. 286, 9 N. E. 302, it is held that he may rely on the safety of the appliances unless the defect is so glaring as to be open to the observation of prudent men; and in Reber v. Tower, 11 Mo. App. 199, that he may do so, except as to matters coming within the range of his peculiar skill. While he must notice visible

defects, he need not inspect the appliance closely: Morton v. Detroit etc. R. Co., 81 Mich. 423, 46 N. W. 111.

c. Inspection by Servant.

1. **Not Ordinarily Required.**—An employé operating a machine is not required to inspect it, but is required to see what any ordinarily careful and prudent operative would have seen of its condition: Record v. Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334. See, also, Borden v. Daisy Roller-Mill Co., 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91.

2. **May be Imposed by Master.**—The duty of inspection may, however, be imposed upon a servant: Chicago etc. R. Co. v. Merrman, 95 Ill. App. 628. Speaking of a rule of this character, the court, in Memphis etc. R. Co. v. Graham, 94 Ala. 545, 10 South. 283, said: "So far as rule 140, or any other rule, militates against the liability imposed upon the employer or master under section 2590, or contravenes the principle of law which requires the employer or master to furnish and maintain suitable material and appliances for the safe prosecution of its business, and the right of the employé to presume that this has been done, it will be regarded as wholly inoperative, and afford no protection to the employer or master; but, so far as rule 140 imposes the duty on employés to examine for their own safety the condition of the car, engines, and machinery, etc., before using them, or exposing themselves on or with the same, so as to ascertain as far as reasonably can be done their condition and soundness, it is reasonable and proper.

"It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent as that expected and required of the employer or master, or person intrusted generally with this duty for the public safety, or safety of employés; but the character of the general duties to be performed by conductors and brakemen is such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and know to some extent when they are not in proper condition for safe use. To the extent of their information and the opportunities afforded to make such examination, consistently with their other duties and the circumstances attending, they should observe and obey the rule."

That a company will be deemed to have waived rules which are habitually violated with its knowledge, see Louisville etc. R. Co. v. Reagan, 96 Tenn. 128, 33 S. W. 1050.

3. **Where in Constant Use of Appliance.**—Where the servant is in constant use of an appliance, with opportunity to know by the exercise of reasonable diligence of its defective condition, he is bound to use that diligence, and not use the appliance, but report

its condition to his master: Peoria etc. Ry. Co. v. Hardwick, 48 Ill. App. 562; Illinois Cent. R. Co. v. Pummill, 58 Ill. App. 83; Chicago etc. R. Co. v. Garner, 78 Ill. App. 281; Toledo etc. Ry. Co. v. Eddy, 72 Ill. 138.

It is the duty of brakemen to see that the brakes on their cars are always in proper working order; and to report all defects to the company; and the fact that the company employs car inspectors at certain stations does not relieve them from the duty of inspecting that part of the machinery which they are expected to handle: Chicago etc. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688. But this applies only to defects which he knew, or could with reasonable diligence have known: Chicago etc. Ry. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661. That the duty of inspection does not rest upon a locomotive engineer, and that he is charged with diligence in this respect no further than to know of defects in the engine which in the prosecution of his work he must necessarily have become acquainted with, see San Antonio etc. Ry. Co. v. Lindsey (Tex. Civ. App.), 65 S. W. 668.

It is not the master's duty to repair defects arising in the daily use of the appliance for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character or requiring the help of skilled mechanics: Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952, reversing Marston v. Cregan, 57 Hun, 591, 10 N. Y. Supp. 681.

d. Knowledge of Defect by Servant.

1. **Want Thereof Necessary to Recover.**—Equally important with the knowledge of the defect by the master is the lack of knowledge by the servant, and is one of the essentials to a recovery by him: Cowett v. American Woolen Co., 97 Me. 543, 55 Atl. 494; Stone v. Oregon etc. Mfg. Co., 4 Or. 52. The employé, then, must show the existence of a defect, knowledge thereof by the master, and his own want of knowledge: Louisville etc. R. Co. v. Hinder, 16 Ky. Law Rep. 841, 30 S. W. 399; Buzzell v. Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212. It is sufficient if the complaint aver a lack of knowledge of the defect, and the servant need not allege that he had not the means of knowledge: Denver etc. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681; Ohio etc. Ry. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Gaar, Scott & Co. v. Wilson, 21 Ind. App. 91, 51 N. E. 502; Muldowney v. Illinois Cent. Ry. Co., 36 Iowa, 462; Louisville etc. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866. In Hull v. Hall, 78 Me. 114, 3 Atl. 38, it was held that it must appear that the master knew, or by proper diligence, ought to have known of the defect, and that the servant did not know, or could not reasonably be held to have knowledge thereof.

Where a defect is so open and obvious that he should reasonably have known of it, a servant will be held to have notice thereof: Pennsylvania Co. v. Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

That the employé knew of the defect causing the injury is a matter of defense, and such knowledge will not be presumed: Chicago etc. Ry. Co. v. Hines, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021.

2. **Where Means of Knowledge Equal.**—There are several decisions holding that if the employé had equal means of knowledge with his master in regard to the faulty condition of the machinery, he cannot recover: Malone v. Hawley, 46 Cal. 409; Hayden v. Smithville Mfg. Co., 29 Conn. 548; French v. Aulls, 72 Hun, 442, 25 N. Y. Supp. 188; Johnson v. Chesapeake etc. Ry. Co., 36 W. Va. 73, 14 S. E. 432; Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 36 C. C. A. 94. Where it is alleged that the master knew of the defect, and that the plaintiff did not, and could not, observe the same because concealed behind and obstructed by a certain frame, the complaint is sufficient to withstand the objection that he had equal opportunity with the employer to have observed the defect: Heltonville Mfg. Co. v. Fields, 138 Ind. 58, 36 N. E. 529.

A different decision in regard to equal opportunity is reached in Nicholds v. Chrystal etc. Glass Co., 126 Mo. 55, 28 S. W. 991, the court saying: "The fact that the master and the servant have equal opportunities to discover the defect will not defeat a recovery by the servant, if the defect was unknown to the servant and the ordinary and careful use of the machine or appliance would not have revealed the defect; and this, for the reason that it is not the duty of the servant to look out for defects, save such as are open to his observation in the ordinary use of the machine or appliance." And see Austin v. Appling, 88 Ga. 54, 13 S. E. 955, holding that it is not error to refuse to charge that if the plaintiff had the same means of knowledge as the defendant, he cannot recover, where the duty of inspection did not rest on him.

3. **Knowledge of Defect does not Imply Knowledge of Danger.**

A. **Rule as to Servant.**—Mere knowledge of the existence of a defect by a servant does not necessarily presuppose a knowledge of the attendant dangers, and will not defeat his claim. As was said in Wuotilla v. Duluth Lumber Co., 37 Minn. 153, 5 Am. St. Rep. 832, 33 N. W. 551: "It is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed. The mere fact that a ser-

vant knows the defects does not necessarily charge him with contributory negligence or the assumption of risks growing out of those defects. The question is, Did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrumentalities exposed him?" To the same effect are Pennsylvania Coal Co. v. Kelly, 54 Ill. App. 622; Chicago etc. R. Co. v. Knapp, 176 Ill. 127, 52 N. E. 927, affirming 74 Ill. App. 148; Gualden v. Kansas City etc. Ry. Co., 106 La. 409, 30 South. 889; Goins v. Chicago etc. Ry. Co., 37 Mo. App. 221; Herbert v. Mound City etc. Co., 90 Mo. App. 305; Galveston etc. Ry. Co. v. Smith (Tex. Civ. App.), 57 S. W. 999; St. Louis etc. Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789. Where, however, the defect is so glaring that a simple knowledge thereof would imply a knowledge of dangers arising therefrom, it will bar a recovery by the servant: Waldhier v. Hannibal etc. R. Co., 87 Mo. 37. In Pennsylvania Co. v. McCurdy, 66 Ohio St. 118, 63 N. E. 585, it was held that a servant is bound to appreciate dangers which may result from defects of which he has, or in the exercise of due care might have knowledge.

B. **Rule as to Master.**—The master is held to a stricter knowledge of the existence of danger: Union Show Case Co. v. Blindauer, 75 Ill. App. 358, in which case the court said: "The facts which do not necessarily operate to charge appellee, the servant, with notice of the danger, may operate to charge appellant, the master, with such notice. The obligation upon each arising from the mere knowledge of the defective condition is not alike: Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876.

"'If the machinery or premises are obviously defective, but not apparently dangerous, the master may be liable for not having taken the necessary steps to ascertain whether they were or were not in fact safe': Wood on Master and Servant, sec. 336." See, however, Little Rock etc. R. Co. v. Duffey, 35 Ark. 602.

IX. Assumption of Risk and Contributory Negligence.

a. **Distinction Between.**—The two defenses most often presented in cases of personal injury caused servants by the use of defective machinery or appliances are that of assumption of risk by the employé, and that of contributory negligence.

These two doctrines are entirely distinct, and in many instances cannot be used interchangeably without confusion: Herbert v. Mound City Boot etc. Co., 90 Mo. App. 305; and it therefore becomes necessary to distinguish them. "Contributory negligence," said the court in Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035, "is a breach of the legal duty of due care imposed by law upon the servant, however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntary upon the part of the

servant. The risk from the master's breach of duty never rests upon the protesting or even unwilling servant. Volens, not sciens, is the test."

b. **Effect of Promise to Repair.**—The distinction between these doctrines is, however, often lost sight of, and especially is this so in cases where there has been a promise to repair the defect by the master, such promise inducing the servant to continue to make use of the defective appliance. As some courts look upon this as coming under the assumption of risk and others under contributory negligence, it has been deemed advisable to treat this subject under one heading.

The rule is as follows: Where the master has knowledge of a defect and promises to repair it, the servant may rely thereon and continue to use the appliance for a reasonable time, not assuming the risk or being guilty of contributory negligence in so doing, providing the danger is not so imminent that a reasonably prudent man could not continue to work therewith: King-Ryder Lumber Co. v. Cochran (Ark.), 70 S. W. 606; Ray v. Diamond State Steel Co., 2 Penne. (Del.) 525, 47 Atl. 1017; Boyd v. Blumenthal, 3 Del. 564, 52 Atl. 330; Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161; Chicago etc. Iron Co. v. Hayes, 91 Ill. App. 269; Illinois Cent. R. Co. v. North, 97 Ill. App. 124; McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; Taylor v. Nevada etc. Ry. Co., 26 Nev. 415, 69 Pac. 858; Pleasants v. Raleigh etc. R. Co., 95 N. C. 195; Hough v. Texas etc. Ry. Co., 100 U. S. 213; Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 36 C. C. A. 94. The promise need not be in direct words, but is sufficient if it may be inferred: Nash v. Dowling, 93 Mo. App. 156.

If the master fails, for a reasonable time, to repair the machine according to his promise, and the servant continues in the employment, he cannot recover if he is injured: City of Kinmundy v. Anderson, 103 Ill. App. 457; Stalzer v. Jacob Dold Packing Co., 84 Mo. App. 565; and what is a reasonable time is a question of fact for the jury: Illinois Cent. R. Co. v. North, 97 Ill. App. 124.

Where the master notifies the servant not to continue if there is danger, and the latter does continue, he thereby assumes the risk, notwithstanding the fact that the master has promised to remove the danger: City of Kinmundy v. Anderson, 103 Ill. App. 457. Where in pursuance with his promise, the master erects a guard for a defective appliance, but it is insufficient, which fact the servant knew, if he continues to use the appliance without complaint, he must be held to have voluntarily assumed the risk: Lally v. Crookston Lumber Co., 82 Minn. 417, 85 N. W. 157.

A servant, employed to perform a simple act of manual labor, the risks of which are obvious, cannot escape from his assumption of those risks by proof that the master promised to furnish him tools

by the use of which his work could be done in a different way, or more conveniently, or even more safely, if it could be done with reasonable safety without the tools: Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190, 12 U. S. App. 574.

The burden of proof is on the plaintiff suing on behalf of the estate of a deceased workman to show that the deceased, who had notice of the defect which caused his death, protested against them and continued in the service on the master's promise to repair: Ford v. Chicago etc. Ry. Co. (Iowa), 71 N. W. 332.

The care to be used by an employé using a defective appliance after a promise to repair need not be of the highest. In McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465, an instruction was held correct which charged that if the plaintiff was induced to continue in the use of the appliance by the promise of the defendant to repair the same, the plaintiff was excused if he used care reasonably commensurate with the increased danger, and, if injured without any fault on his part, and within the limits of the promise to repair, he was entitled to recover, provided the danger was not so great that a reasonably prudent man would not have encountered it.

So a railroad company, furnishing a servant with an unsound engine, and inducing him to continue his work by a promise to repair, cannot hold that servant to the exercise of an unerring choice of the best method of obviating difficulties and lessening danger; and if he uses reasonable and ordinary judgment, he does all that can be required, and the fact that his judgment may not prove to be absolutely the best does not relieve the employer from liability: Illinois Cent. R. Co. v. Creighton, 63 Ill. App. 165.

The promise need not be by the master personally, but it is sufficient if made by the foreman in charge of the department: Ray v. Diamond State Steel Co., 2 Penne. (Del.) 525, 47 Atl. 1017; Boyd v. Blumenthal, 3 Penne. (Del.) 564, 52 Atl. 330.

c. As Defenses.

1. Assumption of Risk.

A. General Rule.—If the employé knew of the defect or danger, either when he entered the employ of the master, or learned of it subsequently, and continued, without complaint, to make use of the machine or appliance, he must be held to have assumed the risk consequent upon its use, and cannot recover: Birmingham Ry. etc. Co. v. Allen, 99 Ala. 359, 13 South. 8; Last Chance Min. etc. Co. v. Ames, 23 Colo. 167, 47 Pac. 382; Western etc. R. Co. v. Bishop, 50 Ga. 465; Indianapolis etc. R. Co. v. Flanigan, 77 Ill. 365; Morris v. Gleason, 1 Ill. App. 510; Agnew v. Supple, 80 Ill. App. 437; Smith v. Sellars, 40 La. Ann. 527, 4 South. 333; Buzzell v. Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Judkins v. Maine Cent. R. Co., 80 Me. 417, 14 Atl. 735; Carey v. Boston etc. R. Co., 156 Mass. 223,

38 N. E. 512; Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Secord v. Chicago etc. R. Co., 107 Mich. 540, 65 N. W. 550; Doyle v. St. Paul etc. Ry. Co., 42 Minn. 79, 43 N. W. 787; Freeman v. Dennison Mfg. Co., 40 App. Div. 99, 57 N. Y. Supp. 478; Spencer v. Worthington, 44 App. Div. 496, 60 N. Y. Supp. 873; Ausley v. American Tobacco Co., 130 N. C. 34, 40 S. E. 819; Mad River etc. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Green etc. Ry. Co. v. Bresmer, 97 Pa. St. 103; Jones v. Yeager, 2 Dill. 64, Fed. Cas. No. 7510; Davidson v. Southern Pac. Co., 44 Fed. 476; and especially will he be deemed to have assumed the risk where, knowing of the defect, he fails to inform his master thereof: Seabord Mfg. Co. v. Woodson, 98 Ala. 378, 11 South. 733; Washington etc. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; or he is not induced by his employer to believe that a change will be made: Camp Point Mfg. Co. v. Ballou, 71 Ill. 417. See, also, Chicago etc. R. Co. v. Smith, 18 Ill. App. 119; Louisville etc. R. Co. v. Allen, 47 Ill. App. 465.

Where a servant, fearing that a certain box underneath a machine was in the way of his foot, and that it might cause him injury, left the machine in order to find his employer to ask him to have the box removed, but, not finding him, resumed his work at the machine, and was injured on account of the box being there, he was held to have assumed the risk: Dobbins v. Lang, 181 Mass. 397, 63 N. E. 911.

The fact that an employé continues knowingly to use a defective machine through fear of losing his place does not alter the rule: Lamson v. American Ax etc. Co., 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585; nor does a command of the master: Nelling v. Industrial Mfg. Co., 78 Ga. 260.

B. Does not Include Master's Negligence.—There is no doubt that a servant, in entering into an employment, assumes all the risks ordinarily incidental thereto: Nashville etc. R. Co. v. Elliott, 41 Tenn. (1 Cold.) 611, 78 Am. Dec. 506; But this does not include defects in the machinery unknown to him, and he cannot be said to have assumed such risks: Gaar, Scott & Co. v. Wilson, 21 Ind. App. 91, 51 N. E. 502; Piette v. Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152; International etc. R. Co. v. Elkins (Tex. Civ. App.), 54 S. W. 931; Pippin v. Sherman etc. Ry. Co. (Tex. Civ. App.), 58 S. W. 961; Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890. As it is sometimes expressed, the employé does not assume risks caused by his employer's negligence: Hill v. Southern Pac. Co., 23 Utah, 94, 63 Pac. 814; Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097; Norfolk etc. R. Co. v. Jackson, 85 Va. 489, 8 S. E. 370. See, also, Wedgwood v. Chicago etc. Ry. Co., 41 Wis. 478.

In Settle v. St. Louis etc. R. Co., 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125, it was held that a servant, though advised of defects in appliances used by him, and of the neglect of the master

to repair them, did not, by remaining in the service and continuing to use them, assume the risk of injury arising therefrom, unless the defect was so glaring and the danger so obvious that a man of common prudence would refuse to use them.

If an employer has superior means of knowledge, or assures the employé that the appliance is safe, he may continue to obey orders, and will be entitled to recover if injured, unless the danger was so obvious that a prudent man would not incur the risk: Wake v. Price, 22 Ky. Law Rep. 696, 58 S. W. 519. If, however, he knows that it is unsafe, he assumes the risk, though his master says that it is safe: Rohabacher v. Woodward, 124 Mich. 125, 82 N. W. 797.

Where a machine was out of order, and started from a dead stop, injuring an employé, and experts testified that it was impossible for the machine so to start, the court held that it could not be said, as a matter of law, that the plaintiff assumed the risk of its happening: Packer v. Thomson-Houston Elec. Co., 175 Mass. 496, 56 N. E. 704.

C. **Burden of Proof.**—The assumption of risk is a matter of defense, and it is for the jury to pass upon the question whether the servant voluntarily assumed the risk: Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; and it is not enough to show merely that he worked on, knowing the danger, as there is a wide distinction between mere knowledge of danger and voluntary assumption of risk: Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611. The burden of proof is on the defendant to show such assumption: Shebek v. National Cracker Co., 120 Iowa, 414, 94 N. W. 930; and the reason therefor is well expressed in Nadau v. White River Lumber Co., 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135, in the following words: "The employé is only presumed to assume the dangers usually attendant upon his employment; and when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such an unusual and unreasonable danger, and fully comprehended its nature, at the time of his employment or before the accident happened. The evidence in this case having established the fact that the injury to the plaintiff was caused by a danger which ought not to have attended his employment, and would not have attended it if the defendant had performed its whole duty toward him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment, by the employé, is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery."

Assumption of risk is a good defense to an action prosecuted under a statute giving a remedy to an employé for defects in the ways, works or machinery of the employer, the statute not attempting to take away such right between the servant and master to contract as to assuming the risks: O'Maley v. South Boston etc. Co., 158 Mass. 135, 32 N. E. 1119.

2. Contributory Negligence.

A. In General.—Though the master be remiss in providing suitable and safe appliances, if the injury complained of would not have occurred but for the negligence of the servant himself, he cannot recover, the doctrine of contributory negligence being a perfectly good and valid defense in this, as well as in other actions for personal injuries. So, where a servant could have avoided injury to himself by adjusting the appliance in another way, the master is not liable: Secord v. Chicago etc. R. Co., 107 Mich. 540, 65 N. W. 550. And where a railroad employé, of his own accord, chose a wrong kind of link for coupling cars, and was injured, it was held that he could not recover: Norfolk etc. R. Co. v. Emmert, 83 Va. 640, 3 S. E. 145. If an employé lays aside goggles which have been provided him to protect his eyes while working, and he is injured by a flying particle of brass hitting him in the eye, he is contributorily negligent: Munn v. L. Wolff Mfg. Co., 94 Ill. App. 122.

Where disobedience to or disregard of a reasonable rule or regulation of the master contributes to the injury, there can be no recovery: Bennett v. Northern Pac. R. Co., 2 N. Dak. 112, 49 N. W. 408, citing Sloan v. Railroad Co., 86 Ga. 15, 12 S. E. 179; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. 339; Karrer v. Railroad Co., 76 Mich. 400, 43 N. W. 370; San Antonio etc. Ry. v. Wallace, 76 Tex. 636, 13 S. W. 565; Memphis etc. R. Co. v. Thomas, 51 Miss. 640; Deeds v. Railroad Co., 74 Iowa, 154, 37 N. W. 124; Railroad Co. v. Rice, 51 Ark. 467, 11 S. W. 699; Sedgwick v. Illinois Cent. R. R. Co., 76 Iowa, 340, 41 N. W. 35; Wolsey v. Lake Shore etc. R. R. Co., 33 Ohio St. 227; Railroad Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380. See, also, Pryor v. Louisville etc. R. Co., 90 Ala. 32, 8 South. 55; Richmond etc. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274.

It is not contributory negligence for an employé to assume that the master has exercised due care in furnishing and maintaining proper appliances, and he need not examine them: Morton v. Zwierzykowski, 91 Ill. App. 462; Nord Deutscher etc. S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 51 Am. St. Rep. 604, 31 Atl. 619. And he is not necessarily guilty of contributory negligence for continuing to work after knowledge of the defect, unless it is glaringly hazardous: Osborne v. Alabama Steel etc. Co., 135 Ala. 571, 33 South. 687; Settle v. St. Louis etc. R. Co., 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125; Pauck v. St. Louis etc. Co., 159 Mo. 467, 61

S. W. 806; but it is a question of fact for the jury to determine from all the circumstances of the case: Farley v. Charleston etc. Co., 51 S. C. 222, 28 S. E. 193, 401; International etc. Ry. Co. v. Williams, 82 Tex. 342, 18 S. W. 700.

Where the plaintiff knew of the defective condition of a derrick, but he was injured after it was no longer in operation, he not anticipating that there was any danger then, he was held not guilty of contributory negligence: Julian v. Stony Creek etc. Co., 71 Conn. 632, 42 Atl. 994.

B. Where Duty on Injured Servant to Inspect or Repair the Appliance.—Contributory negligence is also a good defense where the duty was imposed upon the injured employé himself to inspect, repair, or keep in condition the very appliance by which he was injured, and in such case, he cannot recover: Birmingham etc. Mfg. Co. v. Gross, 97 Ala. 220, 12 South. 36; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Illinois Cent. R. Co. v. Barslow, 94 Ill. App. 206; Conway v. Chicago etc. Ry. Co., 103 Iowa, 373, 72 N. W. 543; Johnson v. Hovey, 98 Mich. 343, 57 N. W. 172; Peppett v. Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900; Jones v. Yeager, 2 Dill. 64, Fed. Cas. No. 7510. See, also, Smart v. Louisiana etc. Co., 47 La. Ann. 869, 17 South. 346. And the same holds true if the omission was that of a servant immediately under the injured employé, whose acts in keeping the appliances in proper condition he was bound to oversee: Maes v. Texas etc. R. Co. (Tex. Civ. App.), 23 S. W. 725.

C. Where He is Negligent in Selecting the Appliance.—If the plaintiff has a right to select the appliance with which he is to work, and he voluntarily chooses one obviously and patently unsound or unsuitable, injuries occasioned thereby would arise from his own fault, and he could not hold the master responsible: Green v. Sansom, 41 Fla. 94, 25 South. 332.

D. Contributory Negligence of Master and Fellow-servant no Bar to Recovery.—The concurring negligence of the master in furnishing defective tools or appliances and of a fellow-servant, does not bar a recovery by the injured employé, although the injury would not have been inflicted but for the negligence of such fellow-servant, for contributory negligence to be a defense, must be that of the plaintiff: Monmouth Min. etc. Co. v. Erling, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117, affirming 45 Ill. App. 411; Cayzer v. Taylor, 76 Mass. (10 Gray) 274, 69 Am. Dec. 317; Haskell v. Cape Ann etc. Works, 178 Mass. 485, 59 N. E. 1113; Noble v. Bessemer S. S. Co., 127 Mich. 103, 81 Am. St. Rep. 461, 86 N. W. 520, 8 Detroit Leg. N. 244; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Ellis v. New York etc. R. Co., 95 N. Y. 546; Cone v. Delaware etc. Ry. Co., 15 Hun, 172, affirmed 81 N. Y. 206, 37 Am. Rep. 491; Galveston etc. Ry. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066; Gulf etc. R. Co. v. Warner

(Tex. Civ. App.), 36 S. W. 118; Norfolk etc. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226. Therefore, the burden is on the master to show that he furnished proper tools, which the servant might have used: Campbell v. T. A. Gillespie Co. (N. J.), 55 Atl. 276.

X. Proximate Cause.

Before a servant can recover, it must appear that his injury was proximately caused by the defect: Breen v. St. Louis Cooperage Co., 50 Mo. App. 202; and if the proximate cause was the servant's own want of care, or that of a fellow-servant the master is not liable: St. Louis etc. Ry. v. Higgins, 44 Ark. 293; Hamby v. Union Paper-Mills Co., 110 Ga. 1, 35 S. E. 297; Piette v. Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152; Norfolk etc. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496.

Where a ladder was furnished a servant, and the work which he was required to do was such a strain upon it as to cause it to move, throwing defendant upon a belt running a machine and injuring him, it was not the structure of the ladder which caused the accident, but rather the strain put upon it: Young v. Burlington etc. Mattress Co., 79 Iowa, 415, 44 N. W. 693. In Pryor v. Louisville etc. R. Co., 90 Ala. 32, 8 South. 55, a brakeman sued, alleging that the accident was caused by a defective link, the breaking of which caused the train to separate into two sections. The evidence showed that after the train had thus separated, he was walking in front of the rear section, intending to couple it with the front section, when he stumbled and fell, and was run over. The court held that the defective link was the remote, and not the proximate, cause of the injury.

If the injury was the direct consequence of the act, the servant can recover, and it is no defense that it could not have been anticipated: Hoepper v. Southern Hotel Co., 142 Mo. 378, 44 S. W. 257.

XI. Burden of Proof.

The burden of proof is upon the plaintiff to establish every element of the case necessary to his recovery. He must, therefore, prove the defect, negligence by showing that the defendant had, or should reasonably be held to have, knowledge of the defect, or that the appliance was not reasonably fit for use: Louisville etc. R. Co. v. Davis, 91 Ala. 487, 8 South. 552; Louisville etc. R. Co. v. Boland, 96 Ala. 626, 11 South. 667; Sappenfield v. Main St. etc. R. Co., 91 Cal. 48, 27 Pac. 590; Georgia R. etc. Co. v. Nelms, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049; Chicago etc. R. Co. v. Pratt, 14 Ill. App. 346; Chicago etc. Ry. Co. v. Armstrong, 62 Ill. App. 228; Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14, 4 Am. Rep. 181; Atchison etc. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204; Atchison etc. R. Co. v. Ledbetter, 34 Kan. 326, 8 Pac. 411; Sawyer v. Arnold Shoe Co., 90

Me. 369, 38 Atl. 333; Painton v. Northern Cent. R. Co., 83 N. Y. 7; Mason v. Richmond etc. R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, 16 S. E. 698; Gunter v. Graniteville Mfg. Co., 15 S. C. 443; and he must show that he was injured by reason of the particular defects pointed out: Texas etc. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. Rep. 707; Texas etc. R. Co. v. Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524, 30 U. S. App. 549. And where he asserts that an inspection of the appliance would have discovered the defect, the burden is on him to prove it: Sack v. Dolese, 137 Ill. 129, 27 N. E. 62; Colfax etc. Min. Co. v. Johnson, 52 Ill. App. 383. The negligence of the defendant may be established by circumstances, without direct proof: Missouri etc. R. Co. v. Crowder (Tex. Civ. App.), 55 S. W. 380.

Defects may be made prima facie evidence of negligence by statute, and in such case the burden rests upon the master to show that he did not have knowledge of the defect, and used due diligence to ascertain and remedy it: Columbus etc. Ry. Co. v. Erick, 51 Ohio St. 146, 37 N. E. 128.

That the cases are not in accord as to the duty of the plaintiff to show himself without fault, see Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14, 4 Am. Rep. 181.

XII. Evidence of Negligence.

a. Accident as Evidence Thereof.—As a general rule, there is no presumption of negligence by the master from the mere fact that an accident occurred through a defect in the machine or appliance, and the plaintiff must show more than the happening of an accident in order to recover: Brymer v. Southern Pac. Co., 90 Cal. 496, 27 Pac. 371; Sappenfield v. Main St. etc. R. Co., 91 Cal. 48, 27 Pac. 590; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 665; Duntley v. Inman etc. Co., 42 Or. 334, 70 Pac. 529; Alexander v. Pennsylvania Water Co., 201 Pa. St. 252, 50 Atl. 991; Johnson v. Chesapeake etc. Ry. Co., 36 W. Va. 73, 14 S. E. 432. Proof of a single defect in a machine resulting in injury, will not be evidence of knowledge by the company: Atchison etc. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204.

An accident may, however, be evidence of negligence: Houston v. Brush, 66 Vt. 331, 29 Atl. 380. The court there discussed this subject fully, saying in part: "Where an accident has occurred, and the physical facts surrounding it are such as to create a reasonable probability that the accident was the result of negligence, in such case the physical facts themselves are evidential, and furnish what the law terms evidence of negligence in conformity with the maxim, 'Res ipsa loquitur.' The cases are not in full accord upon this question. It is often difficult to determine when this maxim is to be applied, and its application must depend to a very great extent upon

the circumstances of each case as it arises. In Shearman and Redfield on Negligence, second edition, section 13, it is said that, 'Though it is not every accident that will warrant an inference of negligence, yet it is not true that no accident will suffice for this purpose. If the plaintiff proves that he has been injured by an act of the defendant, of such a nature that in similar cases, where due care has been taken, no injury has been known to ensue, he raises a presumption against the defendant which the latter must overcome by evidence either of his carefulness in the performance of the act or of some unusual circumstance which makes it at least probable that the injury was caused by some circumstance with which he had nothing to do.' . . . .

"This doctrine does not dispense with the rule that the party who alleges negligence must prove it, but, on the contrary, it only determines the mode of proving it, or what shall be prima facie evidence of negligence in a certain class of cases."

b. **Change of Machinery After Accident.**—The weight of authority is to the effect that evidence of a change in machinery or appliances shortly after the happening of an accident thereby is not admissible: Sappenfield v. Main St. etc. R. Co., 91 Cal. 48, 27 Pac. 590; Lally v. Crookston Lumber Co., 82 Minn. 407, 85 N. W. 157; Myers v. Concord Lumber Co., 129 N. C. 252, 39 S. E. 960; Ausley v. American Tobacco Co., 130 N. C. 34, 40 S. E. 819. In the former of these cases it is said: "It would be a harsh rule to hold that in all cases of accident resulting from defective appliances the employer is to be held accountable for a negligence which is established solely by his efforts to avoid its recurrence; that precautions taken subsequent to an accident are admissions that he was previously negligent. He may have exercised all the care which the law requires, and yet in the light of a new experience, after an unexpected accident has occurred, he may adopt additional safeguards. To hold that the adoption of such new appliances which experience has demonstrated are more efficient than those previously in use, or which invention has developed from observing the defects in those originally adopted, shall be an admission that he was negligent prior thereto would prevent the very conduct in employers which they should be urged to follow: Nalley v. Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Morse v. Minnesota etc. Ry. Co., 30 Minn. 465; Corcoran v. Village of Peekskill, 108 N. Y. 151," 15 N. E. 309.

There is, however, another view. So evidence that repairs were made upon a machine shortly after an accident occurred is competent as tending to show its unsafeness at the time of the accident: Atchison etc. R. Co. v. McKee, 37 Kan. 592, 15 Pac. 484.

c. **Insurance Against Accidents.**—The fact that the defendant was insured against accidents should not be considered by the jury

in determining whether due care had been used, for while it might have the effect of lessening the defendant's reason or motive for being careful, it would not determine whether due and reasonable care had in fact been exercised: Sawyer v. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333.

XIII. Allegations of Defect.

It is not necessary to detail in the petition the defects in the appliance used by the employé, but it is sufficient if the defective instrument be named or described: Galveston etc. Ry. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066. So where it is averred that a certain pulley was wholly insufficient and inadequate both in size and strength to do the hoisting, which the master knew, and that this insufficiency and inadequacy were so located and concealed that the plaintiff could not and did not discover the same, and had no knowledge thereof, and that the master knew that it was unfit and unsafe by reason of its smallness in size and inherent weakness, the complaint is sufficient as against a demurrer: Indiana etc. Coal Co. v. Buffey, 28 Ind. App. 108, 62 N. E. 279.

XIV. Actions Under Statutes.

Statutes have been enacted in several of the states providing that an employé may maintain an action against his master for injuries received by reason of the defective condition of the ways, works, or machinery of the latter.

A steel bar, disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, is not machinery within the meaning of the statute: Clements v. Alabama etc. R. Co., 127 Ala. 166, 28 South. 643; nor is a hammer: Georgia R. etc. Co. v. Nelms, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049. So where an injury was received from a scale flying from an iron rail, when struck with a hammer, in which there was an alleged defect, while a coemployé was attempting to drive a spike, it was not an injury caused by reason of a defect in the condition of the ways, works, machinery or plant used in the business of the master, according to the statute: Georgia Pac. Ry. Co. v. Brooks, 84 Ala. 138, 4 South. 289.

A temporary staging put up by an employé and his fellow-servants for the purpose of painting the outside of a building is not within the terms of such a statute: Adasken v. Gilbert, 165 Mass. 443, 43 N. E. 199. But in Prendible v. Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675, it was held that a large staging, taken down and put up from time to time in different places and intended to be used from four days to a week at a time in each place where erected, was a part of the ways, works, or machinery. That a derrick and its appliances may be found to be within the statute, see McMahon v. McHale, 174 Mass. 320, 54 N. E. 854.

While it may not be necessary, to hold an employer liable under this statute, that the appliances should belong to him, it should at least appear that he has the control of them, and that they are used in his business by his authority, express or implied: Trask v. Old Colony R. Co., 156 Mass. 298, 31 N. E. 6. A car of one company, in use by or in the possession of another company, is part of the ways works and machinery of the latter: Bowers v. Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508.

If the machinery is unsuitable for the purposes for which it is used, although perfect of its kind and in good repair, is a defect within the meaning of the statute: Geloneck v. Dean etc. Pump Co., 165 Mass. 202, 43 N. E. 85.

STREET v. VARNEY ELECTRICAL SUPPLY CO.

[160 Ind. 338, 66 N. E. 895.]

CONSTITUTIONAL LAW—Municipal Corporations.—An act fixing the price of unskilled labor on all public works at not less than a sum specified is a legislative interference with the liberty to contract by counties, cities and towns, which finds no sanction or authority in the doctrine that counties, cities and towns are municipal and political subdivisions of the state. (p. 329.)

CONSTITUTIONAL LAW.—Liberty to Contract, subject only to limitations imposed in the legitimate exercise of the police power for the public welfare, is secured by the constitution of this state and by the fourteenth amendment to the constitution of the United States. (p. 331.)

CONSTITUTIONAL LAW.—Corporations, Both Public and Private, are Entitled to the Benefit of the Provisions of the Fourteenth Amendment for the preservation and protection of their right to make contracts affecting their local affairs. (p. 331.)

CONSTITUTIONAL LAW.—The Minimum Wage Law purporting to fix a minimum rate to be paid unskilled labor employed upon any public work of the state or of any county or city therein is unconstitutional. It violates the fourteenth amendment to the constitution of the United States and sections 1 and 23 of article 1 of the constitution of Indiana, securing to every citizen the inalienable right of liberty and the pursuit of happiness, and prohibiting the granting by the legislature to any citizens or class of citizens of privileges and immunities which, upon the same terms, shall not equally belong to all citizens. (pp. 333, 334.)

S. C. Whitesell, for the appellant.

R. T. MacFall, M. W. Hopkins and Wilfred Jessup, for the appellee.

[338] DOWLING, J. The only question for decision on this appeal is the constitutionality of the act of March 9, 1901 (Acts 1901, p. 282; Burns' Rev. Stats. 1901, secs. 7055a, 7055b), commonly called the minimum wage law. It is raised by a demurrer to the complaint for want of facts and the ruling of the court sustaining the same.

The material averments of the complaint are these: The appellee, the Varney Electrical Supply Company, is a private domestic corporation; the city of Richmond is a municipal corporation organized under the general laws of this state; between October 1, 1901, and January 16, 1902, the appellee was engaged in constructing as one of the public works of said city, an electric light plant, to be used in lighting the public streets, highways, and other public places of said city; the said work was done under a contract between the Varney Electrical Supply Company and the said city of Richmond; the appellant during said [339] period performed work and labor as an unskilled laborer at the request of the appellee, the Varney Electrical Supply Company, by digging holes in which to place the poles of the electric light plant, and in shaving poles; he so labored for five hundred and forty hours, and was entitled to receive twenty cents per hour for such labor; the Varney Electrical Supply Company refused to pay him twenty cents per hour, on the ground that the statute fixing the minimum wages for such labor at that rate was unconstitutional, and the appellant was paid fifteen cents an hour for his said labor; upon these facts the appellant demands judgment for fifty-four dollars, the penalty given by the statute, and three hundred dollars for his attorney's fees.

The statute upon which the action is founded is as follows: "Section 1. That from and after the passage of this act, unskilled labor employed upon any public work of the state, counties, cities, and towns, shall receive not less than twenty cents an hour for said labor, which may be enforced in a proper action, and in case a suit shall be necessary for the recovery of the compensation herein provided for, and where the compensation is recovered, the person suing shall recover also a reasonable attorney's fee, together with a penalty not exceeding double the amount of wages due; provided, that boards of commissioners, common councils of towns or cities are prohibited from making contracts with such laborers by the week, or any definite length of time wherein a price is agreed upon at a rate less than as provided herein.

"Sec. 2. Any contractor or other person in charge of public work of the state, counties, cities or towns, whose duty it is to contract with, employ and pay the unskilled labor on such public work, who shall violate the provisions of section 1 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding ten dollars, to which may be added imprisonment in the county [340] jail not exceeding thirty days": Burns' Rev. Stats. 1901, secs. 7055a, 7055b.

Some of the objections taken to the statute by the appellee are that it unlawfully abridges the privileges and immunities of the citizen; that it deprives persons of liberty and property without due process of law; that it denies to a large class of citizens the equal protection of the law; that it grants to a class of citizens privileges and immunities which, upon the same terms, do not equally belong to all citizens; and that it impairs the obligations of contracts. All these objections are founded upon the provisions of the federal and state constitutions, and it is insisted by the appellee that the act is, therefore, unconstitutional and void. These propositions are denied by the appellant. He claims that the statute does not restrict the liberty of contract, and that its enactment was a legitimate exercise of the police power of the state.

The provisions of the constitution of the United States alleged to be violated by the statute are those contained in section 1 of the fourteenth amendment, which prohibits the state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. The provisions of the state constitution supposed to be involved here are found in section 1, article 1, which declares that all men are endowed with certain inalienable rights and that among them are life, liberty, and the pursuit of happiness; and in section 23, article 1, which forbids the granting by the general assembly to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

The act of March 9, 1901 (Acts 1901, p. 282), undertakes to fix the minimum rate of compensation to be paid to a particular and limited class of laborers employed upon [341] any public work of the state, counties, cities, and towns, without regard to the actual value of such labor, or the rate paid by other per-

sons, natural or artificial, for the same kind of labor in the same vicinity. It prohibits boards of commissioners and common councils of cities from making contracts with unskilled laborers by the week, or for any definite length of time, wherein a price is agreed upon at a rate less than the compensation fixed by the statute. Its restrictions reach beyond the state, counties, cities, and towns, and extend to any contractor or other person in charge of any public work whose duty it is to contract with, employ, and pay any unskilled laborer employed on such work. It not only imposes a penalty, but punishes by fine and imprisonment any contractor or other person in charge of public work of the state, counties, cities, or towns, whose duty it is to employ and pay unskilled labor on such public work, who contracts with any unskilled laborer for a rate of compensation for his services less than twenty cents per hour. It is not contended, and it could not be maintained, that the restrictions in this act upon the right of contract would be valid if the act applied to the work and affairs of private citizens. Even if no express provision of any constitution forbade such legislative interference with the right of contract, it would be void for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation. But such enactments are also held to be in violation of section 1, article 1, of the state constitution, securing to every citizen of the state the inalienable right to personal liberty and to the pursuit of happiness.

But it is argued in support of the validity of the act that no specific provision of the federal or state constitution inhibits this species of legislation, and that counties, cities, and towns are mere political and municipal subdivisions of the state, through which the government is administered. It is said that the state has the power to fix the salaries of [342] its officers, and the wages it will pay to its agent and employés; therefore, it has the right to declare what rate of wages shall be paid to the agents and employés of a county, city, or town employed upon any public work.

While the counties, cities, and towns are political and municipal subdivisions of the state, they are not governmental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and materials to be used upon local improvements, and the payment for the same out of the revenues of the county, city, or town, to the arbitrary and unlimited control of the legislature.

They are corporations as well as political and governmental subdivisions and agencies, and, as such corporations, they have the power to make contracts by which the rate of compensation for property sold to them is fixed. With regard to such contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much upon the same footing as private corporations; and they cannot be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the state. If an act compelled counties, cities, and towns to pay to all stone-masons not less than two dollars per perch for stone to be used on any public work, when the market price of stone was but one dollar and a half per perch, or to the brickmaker not less than twelve dollars per thousand for brick, when brick of the same quality could be bought for ten dollars per thousand, or to the hardware merchant not less than six cents per pound for iron, when iron of the same quality could be had for four cents per [343] pound, such legislation would shock every reasonable mind, and would be universally condemned as unwarranted and unconstitutional. For the same reasons, an act fixing the price of unskilled labor on all public works at not less than twenty cents an hour is a legislative interference with the liberty of contract by counties, cities, and towns, which finds no sanction or authority in the doctrine that counties, cities, and towns are municipal and political subdivisions of the state.

In the very recent case of People v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, the court of appeals of New York, in considering the question, said (O'Brien, J., delivering the opinion of the court): "The legislature does not possess unrestricted power to bind a city hand and foot with respect to all its local business affairs. It cannot fix by statute the price which it must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, at least when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. If it could do all these

things, it could virtually dispose of all the revenues of the city for such purposes as it thought best, and local self-government would be nothing but a sham and a delusion. . . . . The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work; and, moreover, if the latter attempt to assert such right the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to [344] agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: 'Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labors of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions': In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636. . . . . The power to deprive master and servant of the right to agree upon the rate of wages which the latter was to receive is one of the things which can be regarded as impliedly prohibited by the fundamental law upon consideration of its whole scope and purpose as well as the restrictions and guaranties expressed."

In discussing the proposition that the several municipal governments of the state are not in themselves independent and sovereign, but are subdivisions of the general government, created by it with enumerated powers, and possessing none except such as may be fairly drawn from their charters, the supreme court of Ohio, in City of Cleveland v. Clements Bros. etc. Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885, said: "The fallacy of this contention lies in the assumption

that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely [345] local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly."

The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare, is not only secured by the constitution of this state, but is undoubtedly within the protection of the federal constitution also, and is covered by the fourteenth amendment thereof, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws": U. S. Const., 14th Amend., sec. 1; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257; Hooper v. California, 155 U. S. 648, 662, 15 Sup. Ct. Rep. 207; Bailey v. People, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 98; Kuhn v. Common Council, 70 Mich. 534, 38 N. W. 470; People v. Rosenberg, 138 N. Y. 410, 416, 34 N. E. 285; People v. Coler, 166 N. Y. 1, 21, 82 Am. St. Rep. 605, 59 N. E. 716; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313. Corporations, both private and public, are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs: In re Tiburcio Parrott, 1 Fed. 481; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746, 764, 4 Sup. Ct. Rep. 652; Blythe v. State, 4 Ind. 525; Board etc. v. Pollard, 153 Ind. 371, 55 N. E. 87; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418.

If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, [346] and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by

the English parliament, in the worst of times, were the statutes of labor of Henry VI and Edward IV. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statutes with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions. The circumstances that the act of March 9, 1901 (Acts 1901, p. 282), reverses the conditions of the statutes of labor of Henry VI and Edward IV, and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional: People v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716; State v. Norton, 5 Ohio N. P. 183; Commonwealth v. Perry, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126; Ramsey v. People, 142 Ill. 380, 32 N. E. 364; Jones v. Great Southern etc. Hotel Co., 79 Fed. 477; State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781; Shaver v. Pennsylvania Co., 71 Fed. 931; Atkins & Co. v. Town of Randolph, 31 Vt. 237; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; City of Cleveland v. Clements Bros. etc. Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885.

The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be deprived [347] of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than

laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statute exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues cannot be applied in this way: McClelland v. State, 138 Ind. 321, 37 N. E. 1089; State v. City of Indianapolis, 69 Ind. 375, 35 Am. Rep. 223; Warren v. Curran, 75 Ind. 309.

Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns, on public improvements, a classification is made which is unnatural and unconstitutional. The laboring men of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of [348] future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefit of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence? Unless the legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone-masons, bricklayers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply

and demand, competition, personal qualities, energy, skill, and experience, may enable them to do.

After the most careful and thorough examination of all the questions of law presented by the demurrer in this case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed.

Jordan and Gillett, JJ., upon the facts, concur in the result.

Statutes Limiting the number of hours each day for which labor may be contracted for on public works have been pronounced unconstitutional, because interfering with the right of contract: Cleveland v. Clement Bros. Construction Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120. But see State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52; monographic note to Booth v. People, 78 Am. St. Rep. 244, 245; International Text-Book Co. v. Weissinger, 160 Ind. 349, post, p. 334, 65 N. E. 521. And so has a statute declaring that no employer shall impose a fine, or withhold any part of the wages of an employé, for an imperfection in the product of his labor: Commonwealth v. Perry, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126.

INTERNATIONAL TEXT-BOOK COMPANY v. WEISSINGER.

[160 Ind. 349, 65 N. E. 521.]

CONSTITUTIONAL LAW.—A Statute Prohibiting the Assignment of Future Wages to become due employés is constitutional. It does not violate the fourteen amendment to the constitution of the United States nor section 1 of article 1 of the constitution of Indiana, declaring all men endowed with certain inalienable rights, among which are life, liberty, and the pursuit of happiness. (p. 340.)

J. W. Fortune, S. N. Chambers, S. O. Pickens and C. W. Moores, for the appellant.

M. Z. Stannard, for the appellees.

349 DOWLING, J. The appellant (formerly the Colliery Engineer Company, but afterward by change of name, the International Text-book Company) sued the appellees, Horace L. Weissinger and the American Car and Foundry Company, upon an order alleged to have been executed by the said Weissinger, and accepted by the said American Car and Foundry Company, of which the following is a copy:

"June 7, 1899.

"To the American Car and Foundry Company:

"Please pay the Colliery Engineer Company of Scranton, Pa., proprietors of the International Correspondence Schools, the sum of two dollars per month, from such wages as may be due me, until the total sum of sixty-one dollars and twenty-five cents is paid them for a complete architectural course, purchased by me. First payment on this order to be made from money due on next pay-day succeeding date of this order.

350 "HORACE WEISSINGER.

"Occupation: Carpenter. Address: New Albany, Indiana. Shops employed in: . . . . Under whom employed: F. Kahler. Paymaster: W. C. Ruddell. Name and title of official to whom this order is to be sent for collection."

A demurrer to the complaint was sustained upon the ground that the instrument which was the foundation of the action was, in legal effect, an assignment of future wages to become due to the appellee Weissinger from his coappellee, the American Car and Foundry Company, and was in violation of sections 1 and 4 of an act of the legislature of this state approved February 28, 1899 (Acts 1899, p. 193; Burns' Rev. Stats. 1901, secs. 7059, 7059c), which are in these words: "Section 1. That every person, company, corporation or association employing any person to labor, or in any other service for hire, shall make weekly payments for the full amount due for such labor or service, in lawful money of the United States to within six days or less of the time of such payment; but if, at any time of stated payment, any employé as aforesaid shall be absent from his regular place of labor or service, he shall be paid in like manner thereafter on demand; provided, that this act shall not apply to any employé engaged by a common carrier in interstate commerce. . . . . Section 4. The assignment of future wages, to become due to employés from persons, companies, corporations or associations affected by this act, is hereby prohibited, nor shall any agreement be valid that relieves said persons, companies, corporations or associations from the obligation to pay weekly the full amount due, or to become due, to any employé in accordance with the provisions of this act; provided, that nothing in this act shall be construed to prevent employers advancing money to their employés."

The appellant refusing to amend its complaint, judgment was rendered for the appellees. The ruling on the demurrer is the error assigned.

[351] For the reversal of the judgment, counsel rely upon two propositions, which are thus stated in their brief: "1. Assignments of future wages to be earned are held to be valid and legal contracts by the weight of authority of the courts of this country; 2. Sections 1 and 4 of chapter 124 of the acts of 1899 (Acts 1899, p. 193) are unconstitutional, for the reason that they prohibit and limit the right of a citizen of Indiana to make contracts in violation of article 1, section 1 of the bill of rights of the constitution of the state of Indiana, and of section 1 of the fourteenth amendment to the constitution of the United States."

The writing referred to in the complaint, although in form an order for the payment of money, operated as an assignment of the wages mentioned in it: Gray v. Trafton, 12 Mart. (La.) 702; Daves v. Haywood, 22 N. C. 313. For the purposes of this case, it may be admitted that assignments of future wages to be earned are valid contracts, provided they are not prohibited by a statute which the legislature has the constitutional authority to enact. This qualified admission leaves for decision only the question of the constitutional validity of the two sections above set out. If it can be said that these sections contain unreasonable restraints upon the liberty of the citizen, or that they deprive any person of property without due process of law, then they fall within the express prohibition of section 1, article 1, of the constitution of this state, or of section 1 of the fourteenth amendment of the constitution of the United States.

These sections do, unquestionably, limit and restrict in a very marked degree the liberty of the citizen to enter into contracts which, in the absence of the statute, he would have the right to make. By section 4 he is absolutely disabled from making an assignment of future wages to be earned by him. Such a prohibition can be sustained only on the ground that some public interest is involved, and that it is of such a character as to render it a legitimate subject of legislative regulation or control. The wages of laborers [352] have been the subject of legislative solicitude and action in this state for many years, and in a great variety of forms. The stockholders of corporations, organized for manufacturing or mining or chemical purposes, were made individually liable for all debts due and owing laborers, servants, and apprentices for services rendered, without limit as to the amount of such debts. To all other creditors of the corporation, such stockholders were liable only to an

amount equal to the stock held by them respectively: 1 Rev. Stats. 1852, p. 360, sec. 11.

By the act of August 24, 1875 (Acts 1875, s. s., p. 29; Burns' Rev. Stats. 1901, sec. 5077), the stockholders of every company organized to carry on any kind of manufacturing or other business authorized by that act were declared to be individually liable for all debts due and owing to laborers, servants, apprentices, and employés for services rendered such corporations, although not liable for other debts to any amount except to the extent of the stock subscribed by them.

Individual liability of the stockholders of railroad companies to laborers for work done in the construction of such roads was created by the general railroad act of 1852, and was afterward affirmed or extended by later statutes: 1 Rev. Stats. 1852, p. 421, sec. 38, p. 423, sec. 10; Acts 1865, s. s., p. 120, sec. 38; Burns' Rev. Stats. 1901, secs. 5198, 5231.

Wages to an amount not exceeding fifty dollars, due to any employé for work and labor performed within two months of the death of a decedent, were made a preferred claim against the estate by the act of 1881: Acts 1881, p. 423; Burns' Rev. Stats. 1901, sec. 2534; Rev. Stats. 1881, sec. 2378.

So, too, the wages of each employé to an amount not exceeding fifty dollars earned within the preceding six months, are made a preferred claim where the property of the employer is seized on mesne or final process, or the business is suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee: Burns' Rev. Stats. 1901, sec. 7051. In certain cases they are exempted from attachment, garnishment, [353] or proceedings supplementary to execution: Burns' Rev. Stats. 1901, secs. 970-972.

The act of March 3, 1885 (Acts 1885, p. 36), made debts for manual or mechanical labor a preferred claim against all persons and corporations when the property of the debtor passed into the hands of an assignee or receiver, and they were required to be paid in full before the payment of any other debts excepting claims for the costs and expenses of the proceedings.

Many other statutes might be mentioned, but those referred to sufficiently indicate the importance of the subject of wages in the estimation of the legislature, and the variety of cases in which attempts have been made to protect the interests of the wage-earner. The reasons for such legislative supervision and control are readily found in the number and situation of ordinary laborers and employés. According to the last census, the

number of wage-earners employed in manufacturing and mining industries alone in this state was one hundred and fifty-five thousand nine hundred and fifty-six. The amount of wages paid to them annually is stated at sixty-six million eight hundred and forty-seven thousand three hundred and seventeen dollars. The census report is but partial and imperfect, as a large number of companies and corporations, engaged in manufacturing and mining, failed to make the returns required from them. No statistics are furnished by the census of the number of wage-earners employed in other occupations besides those of manufacturing and mining. The figures herein stated are sufficient, however, to show how large a portion of the citizens of this state fall within the classification of wage-earners. A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessaries of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice [354] at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage-earner without present or future means of support. By removing the strongest incentive to faithful service—the expectation of pecuniary reward in the near future—their effect would be alike injurious to the laborer and his employer. It is clear that the object of the act of 1899, supra, was the protection of wage-earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly, or improvidence. We cannot say that no just ground existed for such legislative interference for so commendable a purpose.

The disability imposed by the act of 1899, supra, is similar to that which renders married women incompetent to bind themselves or their property by contracts of suretyship: Burns' Rev. Stats. 1901, sec. 6964. It does not differ in its nature from those humane rules of the law which make void agreements before judgment to waive the benefit of exemption laws, and of laws providing for a stay of execution, or regulating the rights

of the parties under mortgages on household goods: McLane v. Elmer, 4 Ind. 239; Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46; Hancock v. Yaden, 121 Ind. 366, and cases cited on pp. 369, 370, 16 Am. St. Rep. 396, 23 N. E. 253; Zumpfe v. Gentry, 153 Ind. 219, 54 N. E. 805.

In Cooley's Constitutional Limitations, sixth edition, 744, in an enumeration of some of the cases in which the police power of the state may be exercised without transcending the limits of constitutional authority, the author says: "So, for the protection of laborers against the oppression of employers, it is held competent to forbid their being paid in anything else than legal tender funds." A decision to this effect was made by this court in Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253.

355 In a very recent case in the supreme court of the United States, an act of the legislature of the state of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés was held valid. In the course of its opinion the court said: "But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters: Atchison etc. R. R. v. Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609"; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22, 22 Sup. Ct. Rep. 1.

If the legislature, in the exercise of its general police power, to secure the safety and welfare of the state may deprive the laborer and his employer of the right to contract for the payment of wages in anything else than legal tender notes or other lawful money, we do not perceive why it may not, also, in the exercise of that power prohibit the assignment of wages before they are earned. The reason and public necessity are as clear and cogent in the one case as in the other. The purpose of the legislation in each is to protect a large and important class of citizens from imposition, unfair dealing, and the consequences of their own improvidence. The act of February 28, 1899 (Acts 1899, p. 193), applies equally to all citizens, and is not subject to the objection of a partial or improper classification. The sections before us do not extend to wages which have been earned, but merely suspend the right to dispose of wages by

assignment until they are earned. They render void an agreement into which no prudent man, ordinarily, would wish to enter.

The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

The Right of Contracting as one sees fit stands untrammeled, as a general rule; but the state may restrict this right in the interest of public health, morals, and the like: Davis Coal Co. v. Polland, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; Russell v. Pittsburgh etc. Ry. Co., 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678. A statute in effect prohibiting an employé from assuming the risk of hazardous appliances is constitutional: Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531. So is a statute limiting the number of hours per day which a female employé shall labor: State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52. And so is a statute forbidding the execution in advance of contracts waiving the right of employés to the payment of their wages in money: Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253. For instances where the legislature has transcended its authority in its attempt to protect or favor employés, see Street v. Varney Elec. Supply Co., 160 Ind. 338, ante, p. 325, 64 N. E. 895; Mathews v. People, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 91 Am. St. Rep. 934, and cases cited in the cross-reference note thereto; monographic note to Booth v. People, 78 Am. St. Rep. 242-245.

SEIFERT v. STATE.

[160 Ind. 464, 67 N. E. 100.]

ABORTION—Who Guilty of as Principal.—One who procures an instrument for a woman, which he advises and directs her to use upon herself, to produce a criminal abortion, may be convicted as a principal, where she, pursuant to such advice and direction, uses the instrument in his absence, causing her to miscarry and die. (pp. 341, 342.)

CRIMINAL LAW—Presence at Commission of Felony, What is.—One who causes a crime to be committed through an innocent agent is deemed constructively present at such commission, and the test is not whether the agent is morally innocent, but whether he is criminally responsible for the particular crime. (p. 342.)

CRIMINAL LAW.—Where One Might not Otherwise be Deemed an Accessory, He may be Held as a Principal, if there is no other person who may be treated as the principal. Otherwise we should have the solecism of a felony without a principal. (p. 343.)

EVIDENCE.—Dying Declarations are Competent in Prosecutions for Causing Death by Criminal Abortion. (p. 343.)

EVIDENCE.—The Dying Declarations of a Woman on Whom it is Claimed that an Abortion has been Committed, to the effect

that she told the accused that she was pregnant by him, who thereupon said that he would help her to get away with it, and thereafter gave her a catheter, which she used and thereby produced abortion, are admissible against him. (p. 344.)

CRIMINAL LAW.—The Corpus Delicti in a Prosecution for Criminal Abortion is sufficiently established by proof of the abortion and death, and by evidence showing two openings from the womb into the abdominal cavity, delay in calling a physician, and the statement of the woman just before her illness of her intention to get rid of the child. (p. 345.)

EVIDENCE.—Dying Declarations are Open to Contradiction by Inconsistent Statements previously made by the deceased. (pp. 345, 347.)

EVIDENCE—Privileged Communications.—A Request to a Physician to Aid in the Commission of a Crime cannot be a privileged communication, as where he is requested to produce a criminal abortion. (p. 346.)

EVIDENCE—Communications to a Physician.—A statement made to a physician when he calls to collect his bill for services previously rendered cannot be excluded from evidence on the ground that it is a privileged communication, when his advice is not sought nor obtained at that time. (p. 348.)

EVIDENCE Dying Declarations, Instructions Respecting.—In a prosecution for abortion, where the dying declarations of the woman have been admitted in evidence, an instruction that the jury may consider the fact that she had made admissions contrary to such declarations should not be refused. (p. 348.)

H. U. Johnson and T. J. Study, for the appellant.

W. L. Taylor, attorney general, C. C. Hadley and Merrill Moores, for the state.

465 GILLETT, J. Appellant was charged with producing a criminal abortion, resulting in the death of the woman. From a judgment of conviction he appeals to this court.

The first question presented is whether a person who procures an instrument for a woman, which he advises and directs her to use upon herself to produce a criminal abortion, can be convicted as a principal, where the woman, pursuant to such advice and direction, uses such instrument for such purpose, in the absence of the former, thereby causing her to miscarry and die.

Assuming, without deciding, that it was not the purpose of the legislature, in the enactment of section 1857 of Burns' Revised Statutes of 1901, entirely to blot out the distinction between principals and accessories, we think that it may still be affirmed that appellant 466 was properly charged as a principal. While the principal in the commission of a felony must be actually or constructively present at the time of its commission (1 Bishop's Criminal Law, 8th ed., sec. 648; McClain's Criminal

Law, sec. 204), yet a person who causes such a crime to be committed through an innocent agent is deemed constructively present: McClain's Criminal Law, secs. 187, 207; 1 Bishop's Criminal Law, 8th ed., secs. 648, 651; Commonwealth v. Hill, 11 Mass. 136; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774. This fiction of the constructive presence of the real instigator and promoter of the crime is indulged in a case where an innocent agent commits the act, because there would otherwise be no principal. This being the reason for the doctrine, it is evident that the test as to whether the former is a principal or an accessory does not depend upon whether the agent is morally innocent, but upon whether he is criminally responsible for the particular crime charged. As said by Mr. Bishop: "Since there must always be a principal, one is such who does the criminal thing through an innocent agent while personally absent. For example, when a dose of poison, or an animate object like a human being, with or without general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, there being no one but the latter whom the law can punish, it of necessity fixes upon him as the doer": 1 Bishop's Criminal Law, 8th ed., sec. 651.

It is evident, in view of the provisions of section 1997 of Burns' Revised Statutes of 1901, that the penalties of the next preceding section are denounced, not primarily, if at all, against the woman, but against the third person: State v. Murphy, 27 N. J. L. 112; State v. Hyer, 39 N. J. L. 598; Moore v. State, 37 Tex. Cr. Rep. 552, 40 S. W. 287; McClain's Criminal Law, sec. 204. If she could be liable at all under the last-mentioned section, it could only be as an accomplice to such third person, as held in State v. McCoy, 52 Ohio St. 157, 39 N. E. 316 [467] and that would require that such third person should be moved up to the degree of principal. Moreover, if the act, done with the criminal purpose, eventuates in the death of the woman, that is a substantive offense (Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815), and as it is not consummate until her death, it is evident that she cannot become the principal, and that for want of some principal whom the third person may be regarded as an accessory to, the latter must be treated as a principal, or else we have the solecism of a felony without a principal. It is argued by appellant's counsel that there was no principal, and therefore no crime. The maxim "Qui facit per alium, facit per se" is of extensive application in the criminal

law, and, if the state's theory of the facts be assumed, it may be stated that appellant as clearly within the operation of the maxim as a working rule.

Complaint is made of the rulings of the trial court in admitting the dying declarations of the woman, taken in interrogatory form. The questions and answers complained of are as follows: "3. Were you pregnant with a bastard child recently? A. Yes." "10. When did you first tell Joe Seifert that you were pregnant by him? A. I don't know when it was." "12. When you told Joe Seifert that you were pregnant by him, what did he say, if anything? A. He didn't say much about it; only he said he would help me get away with it, and I said all right. 13. What did he do, if anything, toward helping you to get away with it? A. He got a catheter and brought it to me. 14. What did he say, if anything, when he brought you the catheter? A. He didn't say anything. 15. Did you know what it was when he brought it to you? A. Yes, I'd seen them before. 16. Did you know how to use it? A. Yes." "19. When did you use it the last time? A. About four months ago. 20. Where were you when you used it? A. At my home on Washington avenue, No. 28." "22. What, if anything, had you said to him and [468] he to you about your condition before you used it the last time? A. I told him, 'I am in trouble'; and he said, 'You will have to get out of it.' 23. When Mr. Seifert gave you the last catheter did you use the same? A. Yes. 24. Did he tell you to use it? A. Yes, he told me to use it."

It is not disputed that dying declarations are competent in prosecutions for causing death by criminal abortions, the element of death being a substantive part of the charge: Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815. Such declarations are admitted upon the ground of necessity. The necessity, however, does not depend upon the stress of the particular case, but upon the fact that ordinarily there is no other equally satisfactory proof of the circumstances connected with the fatal injury. Dying declarations being an exception to the rule excluding hearsay testimony, the above consideration marks, in a general way, the extent of the exception. "The declarant," says the supreme court of Alabama, "does not become a general witness. He can only speak of the transaction which causes the death, and such accompanying acts, statements and conduct as shed light on it; the res gestae in a strict sense": Sullivan v. State, 102 Ala. 135, 141, 48 Am. St. Rep. 22, 15 South. 264. Ac-

cordingly, it has quite frequently been held that testimony of prior difficulties and prior threats is incompetent: Binns v. State, 46 Ind. 311; Jones v. State, 71 Ind. 66; Reynolds v. State, 68 Ala. 502; Warren v. State, 9 Tex App. 619, 35 Am. Rep. 745; State v. Perigo, 80 Iowa, 37, 45 N. W. 399. There is much force in the suggestion that, "As soon as the limit fixed by absolute necessity is passed, the principle upon which the exception is based being exceeded, there is no longer any limit whatever, and dying declarations become admissible, not merely to prove the act of killing, but to make every homicide murder by proof of some old grudge": State v. Shelton, 47 N. C. 360, 364, 64 Am. Dec. 587. Prior difficulties and prior threats may not, [469] however, have had any part in the killing, but the dying declarations complained of by appellant in this case, for the most part, lie at the basis of the controversy. The theory of the state is that the appellant furnished the deceased with a catheter, and incited her to use it to produce a criminal abortion. As a person occupying practically the position of an accessory before the fact, his criminal conduct, if he is guilty as charged, consisted in the furnishing of the instrument and in the inciting of the deceased to perform an abortion on herself. We cannot consent to the view that the dying declarations must be confined to the time when deceased committed the act that resulted in an abortion, for that would leave appellant out of view entirely. The furnishing of the instrument and the inciting of the deceased to commit an abortion are as central and vital elements in the case as was the act of the deceased. In holding that declarations concerning all of these elements are proper we think that we are fully within the rule that the circumstances of the death must be the subject of the dying declaration.

We shall now refer to the questions and answers complained of more particularly. We need not rule on the motion to strike out questions 3 and 10 and their respective answers, as the case will have to be reversed for other reasons, and appellant is already too far committed to the facts that said answers tend to establish to enable him to controvert them hereafter. It is the opinion of the writer that questions 13, 15, and 16, and the respective answers thereto, should have been suppressed, particularly question 13 and answer; but it is the opinion of the other members of the court that, considering the declarations as a whole, there was no reversible error in permitting all of the questions and answers to be read that the trial court submitted to the jury.

We do not deem it necessary to decide whether the corpus delicti can be proved by dying declarations. The [470] abortion and the death as a result thereof were very clearly proved, and the only remaining question, in so far as the corpus delicti was concerned, was whether natural causes brought about the abortion or whether a criminal operation occasioned it. In view of the evidence of the two openings from the uterus into the abdominal cavity, the delay in calling a physician, and the statement of the deceased, made to the appellant just before her sickness, of her purpose to get rid of the child (see Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. Rep. 909; Commonwealth v. Treftehen, 157 Mass. 180, 31 N. E. 961; State v. Howard, 32 Vt. 380; State v. Dickinson, 41 Wis. 299; Boyd v. State, 14 Lea, 161; Blackburn v. State, 23 Ohio St. 146), we have concluded that the corpus delicti was so far proved as not to present any question of law to this court. See, upon the subject of the corpus delicti in cases of this character, Campbell v. People, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; State v. Williams, 52 N. C. 446, 78 Am. Dec. 248, and note. And see, also, Stocking v. State, 7 Ind. 326.

It has been said that dying declarations are admitted to bring the manslayer to justice. It may be that there ought to be evidence reasonably warranting the inference of an unlawful homicide before dying declarations are admitted, but, such prior evidence existing, we perceive no reason why the declarations, when admitted, should not have a suppletory effect.

The statements of the deceased in her dying declarations were open to contradiction: People v. Lawrence, 21 Cal. 368; Battle v. State, 74 Ga. 101; Felder v. State, 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145. Upon the trial of the case appellant sought to contradict the portions of said declarations that incriminated him by the testimony of a physician as to statements that the deceased had made to him. The physician, when called as a witness, testified that he had been the physician of the deceased for some [471] time, and that she called upon him for the purpose of receiving treatment about three months before her death. Upon the propounding of the next question, relative to said visit, the state objected, on the ground that the communication was privileged. In response to appropriate questions, the appellant then sought to show by said witness that after deceased had so consulted him, and after he had so advised her, she then stated to him, in an entirely separate and distinct conversation, that she desired him to perform a crim-

inal abortion upon her person; that he refused to do so, and that she then said if he would not aid her, she would use a catheter to produce it herself; that Joe Seifert was the father of her child, and had tried to persuade her not to commit an abortion upon her person; that he wanted to marry her, but that she was not so situated that she could marry him at that time. It is provided by statute in this state that "the following persons shall not be competent witnesses: . . . . 4. Physicians, as to matter communicated to them as such, by patients, in the course of their professional business, or advice given in such cases": Burns' Rev. Stats. 1901, sec. 505; and see sec. 1865, supra. Notwithstanding the broad language of the enactment, we think that a request to a physician to commit a crime is not privileged: Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Coveney v. Tannahill, 1 Hill, 33, 37 Am. Dec. 287; State v. Kidd, 89 Iowa, 54, 56 N. W. 263; State v. Smith, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; 23 Am. & Eng. Ency. of Law, 2d ed., 88. As said by Chief Baron Gilbert, relative to communications to attorneys: "Where the original ground of communication is malum in se, as if he be consulted on an intention to commit a forgery or perjury, this can never be included within the compass of professional confidence, being equally contrary to his duty in his profession, his duty as a citizen, and as a man": 1 Gilbert on Evidence, 277.

The matter of difficulty in this case is the segregation of the competent from the incompetent. We think, however, [472] that the questions asked were fairly calculated alone to develop that which was competent. If the deceased requested the physician to perform a criminal abortion upon her person, as the offer to prove tended to show, that fact could have been developed as a proper introductory fact, and that would furnish the basis for a showing in a negative way that the proper subject on which professional advice had been sought and given had no relation to an abortion, and was no longer under discussion. This being shown, it would prima facie appear that the balance of the conversation was not privileged.

The statute under consideration is highly beneficent in its operation, and it should not be frittered away by permitting the answering of questions which tend to reveal that which should be kept inviolate. All doubtful points must be solved against the competency of the proposed testimony, but if counsel, by a line of questions, can develop the isolated point concerning which the court can say this is competent, and at the same time

avoid the disclosure of that which should be kept sacred, it is his privilege to pursue that course. In the case of McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336, where the court below has let in evidence of a disclosure to an attorney, although it was claimed that the conversation opened with a prior professional communication, this court held that the subsequent statement was competent, by way of admission, on the ground that the opening and subsequent statements were as separate and distinct as though they had been made at different times.

It is objected by the state that the evidence of the statements of the deceased that we have been discussing would not necessarily contradict anything in the dying declaration. The conversation with the physician was subsequent to the date that deceased fixed as the date that she used the catheter that she declared appellant furnished her, and therefore, we think that the evidence offered would have been in contradiction of her declaration. If there were any [473] doubt upon this point, we think that it ought to be solved in favor of appellant, as he was unable to cross-examine the declarant.

It is further shown by the record that after the deceased had, in a measure, recovered from the illness occasioned by the abortion, the same physician who had performed proper professional service in the effort to relieve her from the consequences of such abortion called upon her to collect the amount of his bill. The physician was asked by appellant's counsel whether at that visit he had any conversation with deceased except that which pertained to the collection of his bill. The witness answered: "None that I can recall; no more than a physician would have with a patient generally—ask them how they were." In response to an appropriate question, appellant then proposed to prove that on that occasion the witness asked deceased about the payment of the bill, and that she said to him that she was not able to pay it; that he then asked her if Joe Seifert would pay it, and that she answered: "No, Joseph Seifert had nothing to do with producing my condition. He didn't advise it, and he didn't advise me to commit an abortion, and won't pay a dollar." The offer to prove was refused, and appellant excepted. The state had before called this witness, and proved by him the physical condition of deceased when he attended her, so there was nothing in the proposed evidence that was new except as to what she at that time said about appellant. We perceive no reason for excluding the evidence of such conflicting statement. The witness had not called on the deceased in a professional

capacity, but on a business matter; she was aware of the object of his call, and neither sought nor obtained his advice. Even the relation had apparently ended at that time, since he was seeking compensation for his services. We think that it would be a perversion of the statute to hold that the communication in question was privileged: See Bower v. Bower, 142 Ind. 194, 41 N. E. 523.

474 At the proper time appellant tendered an instruction to the effect that, in determining what weight should be given to the dying declarations, the jury might consider the fact that according to her own admission therein the declarant had used the catheter upon her person to produce an abortion. The court refused so to instruct, and appellant reserved an exception. The deceased was not strictly an accomplice (Johnson v. State, 2 Ind. 652), but the moral quality of the act and her connection with it were such as to entitle the appellant to have said instruction given to the jury: State v. McCoy, 52 Ohio St. 157, 39 N. E. 316; Commonwealth v. Boynton, 116 Mass. 343; 1 Cyc. Law & Proc. 190, 191, and cases there cited; 1 Ency. Ev. 60. And see Union etc. Ins. Co. v. Buchanan, 100 Ind. 63, 81; Stevens v. Leonard, 154 Ind. 67, 77 Am. St. Rep. 446, 56 N. E. 27.

For the errors mentioned, the judgment is reversed and a new trial ordered.

On the Crime of Causing Abortion, see the monographic notes to State v. Moore, 95 Am. Dec. 783-788; Abrams v. Foshee, 66 Am. Dec. 82-91. And on the admissibility in evidence of the dying declarations of the victim, see the monographic notes to State v. Meyer, 86 Am. St. Rep. 666, 667; State v. Moore, 95 Am. Dec. 787, 788; Abrams v. Foshee, 66 Am. Dec. 91. If a physician is called upon by one person for the purpose of producing, or assisting to produce, a miscarriage by another, communications made to him in which the patient did not participate are not privileged: State v. Smith, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428.

CASES

IN THE

SUPREME COURT

OF

IOWA.

LUTZ v. ANCHOR FIRE INSURANCE COMPANY.

[120 Iowa, 136, 94 N. W. 274.]

VERDICT—Conclusiveness of.—If the evidence is conflicting the verdict is conclusive of the merits of the case. (p. 350.)

INSURANCE—Waiver of Conditions.—Although an insurance policy provides that its conditions cannot be waived, except by writing on or attached to the policy, yet such conditions may be waived by the conduct of the company which gives the insured reasonable ground to believe that it does not intend to insist upon the strict compliance with the terms of the policy. (p. 351.)

INSURANCE—Violation of Conditions—Estoppel.—If an insurance policy provides that the taking of additional insurance without the written consent of the company shall render the policy void, and the company has notice that this condition in the policy has been violated, it is estopped, by thereafter collecting further premiums from treating the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring. (pp. 351, 352.)

Cook & Leach and Sullivan & Sullivan, for the appellant.

Ransier & Everett, for the appellee.

136 WEAVER, J. On February 4, 1898, defendant issued to plaintiff a policy of insurance upon a building in the town of Fairbank, Iowa, for a term of six years. The building was destroyed by fire on the night of December 30, 1900, and this action is brought upon said policy for the loss thus sustained.

The appeal presents for our consideration the single defense that plaintiff, after the date of the policy in suit, 137 obtained additional insurance upon the building without defendant's written consent, and that by such act, according to the terms

of the contract, the policy was avoided, and defendant was relieved from all further liability thereon. The plaintiff concedes that such a clause is contained in the policy, and that he did in fact obtain additional insurance about December 1, 1900, but avers that he notified defendant of such act, and asked consent thereto, and that defendant, instead of exercising its right to insist upon a forfeiture of the contract, waived the same, and elected to treat said insurance as continuing in force, and thereafter made demand upon plaintiff for subsequently accruing installments of premium.

1. The question presented is almost purely one of fact. Under familiar rules the judgment below cannot be reversed for want of evidence unless there is such a complete lack of support in the record as to indicate that the verdict of the jury is the result of passion or prejudice. Where there is a direct conflict between witnesses concerning a material fact it is not for us to determine the question of their comparative credibility. That is the province of the jury alone, and we are not authorized to disturb the finding simply because our minds are inclined to the opposite conclusion. These remarks are more than ordinarily pertinent to a record such as we have before us. There is an irreconcilable conflict in the testimony, and the finding of the jury as to the truth of the disputed matter is decisive of the merits of the litigation.

Plaintiff and the witness Agnew, who was formerly defendant's agent at Fairbank, unite in testifying that on the 12th of December, 1900, the policy, with a letter giving notice of the additional insurance, and asking consent thereto, was inclosed in an envelope, and mailed to defendant at Des Moines, and that the policy was retained by defendant, without responding to the letter or request, [138] until after the fire. On the other hand, defendant's witnesses say that the package was not received at Des Moines until December 31st, and was contained in an envelope postmarked at Fairbank on that day. The alleged envelope was produced in court, but plaintiff and his witnesses both assert that it is not the one in which said policy was sent, but is the envelope in which notice of loss was sent to defendant on the day after the fire, a notice receipt of which is denied by defendant. Now, as the question of the defendant's alleged waiver turns to a very great extent upon the fact as to the time when the notice of additional insurance was received, the determination of the conflict between these witnesses is of prime importance. The policy provided that the taking

of additional insurance would render such policy void unless written consent was indorsed thereon, and that no person acting as agent, employé, or other person than the secretary or assistant secretary of the defendant could in any way or manner waive any condition of the contract, and that such waiver must be in writing on or attached to the policy. It is also true that no such express written waiver was made, or was ever indorsed upon or attached to such policy. Defendant had the undoubted right, if it so desired, to insist upon the strict letter of its contract, and treat the policy as avoided from the moment the additional insurance was procured. On the other hand, it was not within the realm of legal possibilities that it should devest itself of all capacity to waive any contract right it possessed, or should so limit the manner and form in which a waiver may be expressed that such limitation itself might not be waived. This, we think, is substantially the holding of the court in Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 574. If, then, we assume, as the jury evidently found, that notice of the additional insurance was given and request for written consent thereto made on December 12th, and thereafter defendant continued to [139] treat the policy as in force, and give the plaintiff reasonable ground to believe that it did not intend to insist upon the strict terms of the contract in this respect, then the question of a waiver became a proper one to submit to the jury.

It appears without dispute that the premium on the policy had been paid from year to year, and that at the time of the alleged notice of additional insurance, no part of such premium was past due. On the 28th of December, 1900—sixteen days after the alleged notice—defendant notified plaintiff that the next installment of premium would fall due on January 28, 1901, and requested prompt payment to prevent the suspension or avoidance of the policy. On January 29, 1901, after the fire, defendant notified plaintiff of the maturity of the installment, saying to him that if not paid within thirty days, his policy would be suspended. Both of these notices were subscribed by the secretary of the company, the officer named as having power to waive conditions of the contract. On April 9, 1901, defendant, by its attorney, made further demand of plaintiff, and informed him that, if the premium was paid within ten days, the policy would be reinstated. It seems very clear that, if defendant was made aware of the act avoiding the policy on or about the 12th of December, and proposed to insist upon the letter of its contract, it should have acted consistently with that purpose.

It could not treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums. Having received the notice, it was within its power to ignore the failure of plaintiff to observe the precise terms of the policy, and to continue to treat the contract of insurance as still of binding force and effect: Bloom v. State Ins. Co., 94 Iowa, 359, 62 N. W. 810. Whether it did so was a material question of fact, upon both sides of which there was competent testimony, and it was properly submitted as [140] such in the instructions given by the trial court. No objection is made to the court's charge, save in a general way that "each and all" of the paragraphs are erroneous. This is insufficient to raise any question for our consideration.

We find no reversible error in the record, and the judgment below is affirmed.

Procuring Additional Insurance, in violation of an express condition in the first policy, avoids the policy, unless the company waives the right to insist on the forfeiture: Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 South. 116; Taylor v. State Ins. Co., 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577. That the right may be waived, see Phenix Ins. Co. v. Holcome, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059. See, too, Skinner v. Norman, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309.

STATE v. HOOT.

[120 Iowa, 238, 94 N. W. 564.]

MURDER—Assault to Commit—Instructions.—On a prosecution for sending a box containing explosives for another person to open with intent to commit murder, an instruction to the jury that in order to convict, it is necessary to find that the accused was in fact the person who sent the box is sufficient in the absence of a request for special instructions on that subject. (p. 354.)

MURDER—Assault to Commit—Essentials of.—Proof of a specific intent to kill with malice aforethought is essential to the crime of an assault with intent to murder. (pp. 355, 356.)

MURDER—Assault to Commit—Intent.—If a husband sends a box containing explosives to the home of his wife, but addressed to himself, with the expectation and intent that she shall receive and open it and that her death shall result therefrom, he is guilty of assault with intent to murder, regardless of whether his wife was authorized either by him or otherwise to receive and open such box. (p. 358.)

CRIMINAL LAW—Instructions as to Included Offenses.—If it is clear that the accused is either guilty of the specific crime charged or not guilty of any, failure to instruct as to any crime which may be included in the one charged is not error. (p. 359.)

C. E. Pickett, for the appellant.

C. A. Van Vleck, assistant attorney general, S. B. Reed and Courtright & Arbuckle, for the state.

239 BISHOP, C. J. Defendant and his wife, Nettie Hoot, were married in January, 1899. After living together about a week, they separated, and Mrs. Hoot returned to her home, at No. 337 Argyle street, in the city of Waterloo, this state. In May following, defendant returned to his wife at Waterloo, and together they started to make a trip down the Mississippi river, but it seems another disagreement arose and within a few days Mrs. Hoot came back to her home in Waterloo. The defendant visited her there on August 10th, remaining about an hour. He then went away, and did not return again. On October 30, 1899, a letter, addressed to the defendant at No. 337 Argyle street, Waterloo, was delivered by letter carrier to Mrs. Hoot, who opened and read the same. She testifies that previous to this she had frequently opened letters addressed to her husband, and which had been delivered at her residence, and had then forwarded the same to him, if important. The address upon the envelope, together 240 with the letter, were apparently written by a woman, and the letter read as follows: "Chicago, Oct. 22, 1899. Jerome, my dear: You will get all your presents to me by express to-day as I will return them. You know why. Goodby, Tab." The envelope is postmarked "Chicago, October 28, 1899." On the same day the letter was received, an express package was delivered to Mrs. Hoot, the same being addressed to defendant at the street and number mentioned. The handwriting of the address thereon was the same, apparently, as that of the letter previously received. Mrs. Hoot opened the package, and, on taking off the outside paper covering, found a polished box, on each end of which was a handle. Underneath one of such handles there was a drawer, and in it a small hole, evidently intended for use in pulling the drawer out. She put her finger in the hole, and pulled the drawer out a short distance, when there was a sharp explosion, followed by smoke emerging from the box. Such explosion was not sufficiently severe to do any damage, and immediately Mrs. Hoot called in an officer, who took charge of the box. The next day

the officer took the box to a safe location, placed it upon a pile of rock and exploded it by pulling the drawer out, a long cord attached thereto being used for the purpose. The explosion was a terrific one. The pile of rock was blown to fragments and scattered in every direction, and the air was filled with debris. No trace of the box could afterward be found.

1. The box in question was sent by express from Chicago to Waterloo. Appellant complains that the trial court did not fairly and sufficiently instruct the jury upon the subject of the identity of the defendant as the person who sent such box. We have repeatedly held that it is the right of a defendant, charged with the commission of a crime, to have the jury properly instructed, and that every essential part [241] of the case should be covered by the instructions given: State v. Brainard, 25 Iowa, 572; State v. O'Hagan, 38 Iowa, 504. In the instructions given in this case there is no one that is devoted exclusively to the subject matter upon which the complaint is based. But even a cursory reading of the instructions discloses that the jury was repeatedly told that a finding that the defendant was in fact the person who sent the box was essential to a conviction. The instructions are framed in clear, simple language, and we think no room was left for speculation or uncertainty. In our view, it was not possible for the jury to go astray upon the proposition of law involved. We do not say it would have been out of place to have devoted a special instruction to the subject indicated, but as defendant did not so request, and as the subject was otherwise fully covered, we do not think any necessity therefor existed. It cannot be said that the question of the identity of the defendant as the person who committed the alleged offense of itself involves such a matter of special defense as to call for special instructions. What we have said above, therefore, in no sense conflicts with anything that is said in State v. Brainard, 25 Iowa, 572.

2. A further matter of complaint has relation to the legal status of defendant and his wife as of the time in question, and the failure of the trial court to instruct with reference thereto. It is the contention of counsel for appellant, if we correctly interpret his argument, that the facts presented are not sufficient to justify the indictment or warrant a conviction thereunder, and this for the reason that Mrs. Hoot, in receiving and opening the package, acted without right or authority, and, in consequence, was herself a wrongdoer. It is pointed out that the package was plainly addressed to defendant; that there is no

evidence in the record tending to show that Mrs. Hoot had any [242] direct authority to act for or on behalf of her husband in such a matter; and our attention is called to numerous authorities holding that the marital relation, taken by itself, raises no presumption of the relation of principal and agent between husband and wife, and that the wife has absolutely no right to act for the husband, unless authorized so to do, certain matters pertaining to domestic affairs alone excepted. Such is not, in terms, the argument of counsel, but we take it that the conclusion sought to be drawn from the premises stated is that, there being no authority, express or implied, on the part of Mrs. Hoot to open the box in question, and the transmission thereof being in itself a legal act, there is accordingly no basis upon which to predicate criminal intent within the meaning of the law; and this for the reason that it cannot be presumed that defendant contemplated, much less intended, an authorized and unlawful interference with the package.

We may concede the premises, but we cannot yield our judgment to the conclusion. No question of abstract right or authority on the part of Mrs. Hoot is involved. The only question necessary or proper for our consideration in this connection is this: Assuming that defendant was the sender of the box in question, does the evidence in the record before us warrant a finding that it was within his contemplation that such box would be delivered to his wife, and that an attempt would be made on her part to open the same? In criminal law it is cardinal doctrine that every man is presumed to intend all the probable consequences of his willful act: 2 Bishop on Criminal Law, sec. 665. If, therefore, the act done was followed by a result, probable in itself, and such result was within the contemplation of the defendant at the time the act was done, no other rational conclusion can be reached save that the result contemplated was the result intended. Now, it is manifest to us that the doctrines of the law of agency can [243] have no application to the case before us. This is a criminal proceeding, instituted on behalf of the public. Mrs. Hoot has no connection therewith, save that, being the particular individual upon whom the assault is said to have been committed, she is a witness in the case. What were the relations between herself and her husband is material in one sense, and one only; that is, in determining the question of intent. If it was within the expectation of the defendant that his wife would receive and open the box, and that, as a result thereof, her death would probably result, the offense against

the public would be complete. An unauthorized opening of the box, if such was intended, would support the indictment to all intents and purposes the same as an authorized opening. We conclude, therefore, that the contention of counsel in the respect indicated is without merit.

3. It is asserted by counsel for appellant that a specific intent, alleged and proven, is essential to the crime charged in the indictment, and that the evidence in this case wholly fails to disclose any such specific intent. We readily agree that a specific intent to kill, and with malice aforethought, is essential to the crime as charged in this indictment: State v. Keasling, 74 Iowa, 528, 38 N. W. 397. And it is undoubtedly the rule that, where it is sought to attach criminal responsibility to the commission of an act in itself indifferent, the intent necessary to give character to the act as a crime can never be implied; it must be proven and found: 3 Greenleaf on Evidence, sec. 13; Roberts v. People, 19 Mich. 401; People v. Sweeney, 55 Mich. 586, 22 N. W. 50; United States v. Buzzo, 18 Wall. 125, 8 Am. & Eng. Ency. of Law, 287. Such an act becomes unlawful only when a specific intent to thereby accomplish crime is shown. It is manifest that mere proof of the act itself is insufficient for this purpose. Now, it is pointed out that the defendant had the lawful right to purchase dynamite, [244] and to transport the same from one state to another, and in this we may agree. Therefrom, however, counsel argues that, having performed a lawful act only, and no specific intent to thereby accomplish a crime being shown, a conviction cannot be sustained.

Undoubtedly, counsel has correctly apprehended the rules of law, but his position is fatally weak in that the relevant evidence found in the record of the case is not confined to the mere fact of the sending of the box. There is the letter received by Mrs. Hoot in the morning, which the evidence tends to prove was written by the same person who wrote the address upon the box. It was known to defendant that Mrs. Hoot had been in the habit of opening his letters, and a jury would be warranted in finding that it was expected this one also would be opened by her. Counsel does not proceed to the point of contending that the letter was not sufficient to excite the interest of the woman, and to impel her to open the box upon its arrival. In our opinion, it was well calculated, to say the least, to incite the belief that the box contained articles that had been presented by her husband to some other woman, and were now for some reason being sent back. To open the box under such

circumstances might well be found to be the result of a natural impulse.

The evidence warrants a further finding of facts as follows: That during October, 1899, defendant was staying in Omaha, Nebraska, and while there he procured to be made a box, identical in point of description with the one delivered in Waterloo; that about October 25, 1899, he left Omaha, and went to Des Moines, where he purchased five pounds of dynamite. From Des Moines he went to Chicago. He is identified by several witnesses as the person who sent the box in question by express to Waterloo. When apprehended, he was in New Orleans, living under an assumed name. The strained relations existing between defendant and his wife, together with the facts concerning [245] her ownership of property and the life insurance carried by her, bear directly upon the question of motive. Now, taking all these facts, and in reason it cannot be said there was an innocent shipment of a quantity of dynamite. To such purpose a handsome, highly polished box was not necessary; a secret device by means of which the inclosed dynamite would certainly be exploded upon the box being opened by unsuspecting hands was unusual to an ordinary shipment; the making of the box in Omaha, the purchase of the dynamite in Des Moines, and the going to Chicago to express the package to Waterloo; the letter which made an attempt to open the box reasonably certain upon its arrival; the subsequent conduct of defendant—all these are inconsistent in the extreme with any lawful purpose. We think a jury of reasonable men could draw therefrom but one conclusion—that it was intended the box should be opened by Mrs. Hoot, such opening to be attended by an explosion and her certain death.

4. It is said by counsel for the appellant—and we think correctly—that to support a conviction, the record must show acts done by the defendant, "intended, adapted, approximating, and such as, in the ordinary and likely course of things, would result in the commission of the particular crime." Counsel further says that the case here made fails to meet the requirement of the rule. It is pointed out that the delivery of the box to Mrs. Hoot and the receipt thereof by her were unlawful acts, and not to be expected in the ordinary and likely course of things. And it is said that in order to sustain a conviction we must assume that both the express company and Mrs. Hoot would perform unlawful acts. We can readily see that such conclusions may be drawn from the facts. But we are unable to see how the

same can be material. Let it be admitted that the delivery by the express company and the receipt and opening of the box by Mrs. Hoot were unauthorized and unlawful acts, yet [246] such can avail defendant nothing. If the defendant sent the box expecting, and therefore intending, that such box would be received and opened by her, and that, as a result of such opening, a death-dealing explosion was likely to follow, he cannot escape conviction, because forsooth, in the matters of the unauthorized delivery and the unauthorized opening his expectations and intentions were met and fully realized. The presumptions that obtain in ordinary business transactions have no application, and this must be manifest. Was the defendant inspired by criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent? Such is the question with which we have to deal. If, upon the facts presented, it is to be answered in the affirmative, then it would amount to a travesty to say that the force thereof could be destroyed, and guilt be changed to innocence, by merely pointing out that in connection with one or more of the agencies employed acts were done which, although expected and intended, were yet unauthorized by the general laws having relation to the conduct of business affairs.

5. The jury was instructed upon the theory that the defendant was either guilty of the specific crime charged in the indictment, or not guilty of any. No reference is made to any of the included offenses. It may be conceded that a charge of assault with intent to commit murder includes assault with intent to commit manslaughter (State v. White, 45 Iowa, 325); also assault with intent to commit great bodily injury (State v. Schele, 52 Iowa, 608, 3 N. W. 632); also a simple assault (State v. Jarvis, 21 Iowa, 44). It is to be observed that the minor offenses referred to are simply included in the charge of the major offense. They are offenses of the same general class, but lower in order. By section 5407 of the Code it is provided that "the defendant may be found guilty of any offense the commission of which is necessarily [247] included in that with which he is charged in the indictment." Under this section it has been held that where the offense charged is of such a nature that the defendant may properly be convicted of an offense necessarily included in that charge, it is the duty of the court to instruct the jury upon the subject of the included offenses, and a failure to do so will constitute error. But while this is so, it has frequently been held that the statute has

no application to those cases where the facts are such that the defendant must be either guilty of the offense as charged, or not guilty: State v. Sterrett, 80 Iowa, 609, 45 N. W. 401; State v. Cody, 94 Iowa, 169, 62 N. W. 702; State v. Beabout, 100 Iowa, 155, 69 N. W. 429; State v. Cater, 100 Iowa, 501, 69 N. W. 880; State v. Akin, 94 Iowa, 50, 62 N. W. 667.

We have left, therefore, the inquiry whether, under the circumstances of this case, the defendant could have properly been convicted of any offense less than that charged in the indictment. It seems to us there is room for but one conclusion. If defendant sent the box intending that it should be opened, he could have but one purpose in view, and that was to murder. If he did not send the box with such intent, he is guilty of no offense. The character of the contents of the box was such that an explosion meant certain death to one standing at the time over or near the same. Had an explosion actually followed the acts done by Mrs. Hoot, the offense, if any, would have been murder. Such being the facts, there is no more reason for taking into account included offenses than there would be in the case of one who deliberately puts a death-dealing poison into a cup for another to drink. In such cases there can be but the one purpose, and that is to produce death. If death result, there can be but the one crime, and that is murder. It follows from what we have said that there was no error in failing to instruct the jury upon the subject of included offenses.

We have now given consideration to all the matters concerning which complaint is made by counsel for appellant [248] in his argument, and we find no error. The defendant was given a fair trial, the facts disclosed by the record warrant his conviction and the severe sentence imposed, and the judgment is affirmed.

Assault to Kill.—Under an indictment for assault with intent to kill, the specific intent must be proved: Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44, 15 S. W. 889. It has been held, however, that it is not essential to a conviction for assault with intent to murder that the defendant acted deliberately and with premeditation: Wood v. State, 128 Ala. 27, 86 Am. St. Rep. 71, 29 South. 557. See, in this connection, Gibson v. Commonwealth, 106 Ky. 360, 90 Am. St. Rep. 230, 50 S. W. 532. There is a difference between an intent to kill and an attempt to murder: State v. Swails, 8 Ind. 524, 65 Am. Dec. 772. There may be an assault with an intent to commit manslaughter: State v. Connor, 59 Iowa, 357, 44 Am. Rep. 686, 13 N. W. 327. As to whether administering poison or other foreign substances can constitute an assault with an intent to kill, or an

assault of any kind, see Garnet v. State, 1 Tex. App. 605, 28 Am. Rep. 425; Commonwealth v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; State v. Monroe, 121 N. C. 677, 61 Am. St. Rep. 686, 28 S. E. 547. One attempting to commit a violent injury on the person of another by means of an explosion of gunpowder may be guilty of an assault with a deadly weapon, although not present when the explosion occurs: People v. Pape, 66 Cal. 366, 5 Pac. 621.

NOVAK v. PITLICK.

[120 Iowa, 286, 94 N. W. 916.]

BONDS—Liability of Surety.—If a bond is incomplete, defective, and not signed by the principal named therein, it cannot be enforced against a surety without proof of his consent to its delivery in its incomplete condition. (p. 364.)

Ranck & Bradley and R. Otto, for the appellant.

Bailey & Murphy, for the appellees.

[286] WEAVER, J. The plaintiffs allege that they are associated as an unincorporated body or company, known as the Alert Hose Company, at Iowa City, Iowa; that one J. J. [287] Fryauf was by said company appointed to act as its treasurer for a term of one year from May 1, 1899; that, to secure the faithful performance of said trust, Fryauf executed and delivered to the company a bond in the penal sum of two hundred dollars, with the defendant as his surety; that said treasurer has failed and refused to account for and pay over the moneys received by him in said office, to the amount of more than two hundred dollars, and recovery is asked in that sum upon said bond. The bond sued upon is in the following form:

"Know all men by these presents that we, J. J. Fryauf as principal and ——— as sureties, all of Johnson county, state of Iowa, are held and firmly bound unto the Alert Hose Company of Iowa City, Iowa, in the sum of two hundred dollars, well and truly to be paid to said Alert Hose Company. The condition of this obligation being that whereas, said J. J. Fryauf was on the second day of May, 1899, duly elected to the office of treasurer of said Alert Hose Company, said term beginning the first Tuesday in May, 1899, and expiring the first Tuesday in May, 1900.

"Now, if the said J. J. Fryauf shall pay over or cause to be paid over and returned to the said Alert Hose Company or its

authorized officers, all money and property coming into his hands as such treasurer at the end of his term of office, then this obligation be null and void, otherwise to remain in full force and virtue.

"Witness our hands this ——— day of February, 1900.

"(Signed) JOSEPH PITLICK.

"[Stamp.]"

The defendant, by answer, denied the claim of plaintiffs generally, and further alleged that he signed the bond upon condition that it should not be delivered until it was signed by the principal, Fryauf, and another surety, but, in violation of said conditions, it was given to the plaintiffs without such signatures, and showing upon its [288] face that it was incomplete, imperfect, and prematurely delivered. On motion of the plaintiffs, more or less of the affirmative allegations of the answer were stricken out. Owing to obscurity of statement in the motion, the precise extent and scope of this order is not clear; but this is not very material, as we think the principal point made by the appellant is available under his denials.

1. The plea based upon the alleged condition that the signature of another surety should be obtained before delivering the bond undoubtedly presents a good defense, if it be shown that the obligee received the instrument under such circumstances as to be chargeable with notice of the condition: Benton County Sav. Bank v. Boddicker, 117 Iowa, 407, 90 N. W. 822. It is claimed by appellees that no evidence was produced in support of this defense, and there was therefore no error in failing to submit the same to the jury. As the conclusion announced in the following paragraph is decisive of the appeal, we think it unnecessary to enter upon any discussion of this phase of the record.

2. We proceed, then, to consider the effect of the conceded fact that the bond, though purporting to be the bond of Fryauf, as the principal obligor, and though declared upon by plaintiffs in their petition as having been executed by him, was never in fact so executed. The body of the instrument recites the undertaking of J. J. Fryauf as principal and ——— as sureties, and is signed by Joseph Pitlick alone; and we have first to inquire whether such obligation is enforceable against the surety in the absence of an affirmative showing of a consent on his part to its delivery in that condition. While some variance may be found in the adjudicated cases upon this question, the great weight of the authorities is adverse to the position

of the appellees. It is undoubtedly true that one may bind himself for the debt or default of another without joining with him in the same instrument the person for whom he becomes surety or guarantor; but where [289] an instrument is drawn by which one person is to be bound as the principal obligor, and another is bound as surety, and undertakes that his principal shall faithfully discharge the terms of the obligation therein assumed by him, it is almost universally held that the surety cannot be held liable upon such contract if it be not signed by the principal. By many authorities such bond is held to be entirely void, while others hold that the obligee may enforce it by affirmatively showing that the surety consented to its delivery without the signature of his principal. Such an instrument shows its incompleteness upon its face. The first glance at it reveals the absence of the principal party to the obligation, and puts the obligee upon inquiry as to the reason for its delivery in that defective condition. It avails nothing to say that the principal is bound to account for the funds in any event, for, whatever his implied liability by virtue of his fiduciary relation to the obligee, he is not bound by the bond which he has never signed, and no recovery can be had against him thereon. By the express wording of the contract, the bond was to be the bond of Fryauf, and it was for Fryauf's performance of the bond which defendant undertook to stand as surety. The obligation of a surety is not to be extended by implication. He is entitled to stand upon the strict terms of his agreement: Walsh v. Bailie, 10 Johns. 180; Gahn v. Niemcewicz, 11 Wend. 312; United States v. Boyd, 15 Pet. 187; Middleboro Nat. Bank v. Richards, 55 Neb. 682, 76 N. W. 530. In Bean v. Parker, 17 Mass. 594, a bail bond was given for the release of a debtor under civil arrest, but the instrument was not signed by the principal. Upon action brought against the surety, it was held that no recovery could be had. It is there said: "It is essential to a bail bond that the party arrested should be principal. It is recited that he is, and the instrument is incomplete and void without his signature. [290] The remedy of the sureties against the principal would wholly fail or be much embarrassed if such an instrument should be held binding." In Wood v. Sampson, 2 Pick. 24, suit was brought upon an administrator's bond, signed by the surety only, and it was held the action could not be maintained.

The same principle is announced by the Minnesota court in reference to a notary's official bond: Martin v. Hornsby, 55

Minn. 187, 43 Am. St. Rep. 487, 56 N. W. 751. Also to an appeal bond: State v. Austin, 35 Minn. 51, 26 N. W. 906. The defects in these bonds were practically identical with the one now under consideration. In the last-cited case it is said: "It was not the obligation of the principal, for he did not sign it. It did not, so far as appears, bind the sureties, because, from the terms of the instrument, the obligation which they assumed was that of sureties for another, who was principal obligor. It was not, therefore, of effect as a bond of even those who executed it." In Michigan, a like rule is observed: Hall v. Parker, 37 Mich. 590, 26 Am. Rep. 540; Johnston v. Kimball, 39 Mich. 187, 33 Am. Rep. 372. In the latter case, Campbell, J., says: "The obligation of a surety cannot fairly be extended beyond the scope of his written contract, inasmuch as, under our statute of frauds, his agreement must be in writing; and we think that, presumptively, at least, where the contract calls for the signature of other parties, the instrument is to be deemed inchoate and imperfect until they also sign it. . . . . Where several names are written as obligors, and one of them is called upon to sign it, he does so upon an implied understanding that he can, in case of being held responsible, not only have his right of contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract, as it purports to be drawn up. . . . . And if it is claimed that he has waived them or become estopped from relying on them, the [291] burden of proof ought not to be laid upon him to show that there has been no variation, but upon the plaintiff to show what is substantially a new contract."

In a late decision the supreme court of Massachusetts reaffirms the case of Bean v. Parker, 17 Mass. 594, already cited, saying: "An instrument like that in suit ordinarily is and should be executed by all the intended parties. It was for plaintiffs to show that, although not thus executed, the defendant had consented to its delivery under such circumstances that it would bind him, even if it were inoperative and invalid as against the principal": Goodyear Co. v. Bacon, 151 Mass. 460, 24 N. E. 404. Many other courts have acknowledged the correctness of this principle. "If the bond contains the names of other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signature of the others": Fletcher v. Austin, 11 Vt. 447, 34 Am. Dec. 698. See, also, Hall v. Smith, 14 Bush, 604; Board of Education v. Sweeney,

1 S. Dak. 642, 36 Am. St. Rep. 767, 48 N. W. 302; Sacramento v. Dunlap, 14 Cal. 421; People v. Hartley, 21 Cal. 585, 82 Am. Dec. 578; Nash v. Fugate, 24 Gratt. 213, 18 Am. Rep. 640; Markland v. Kimmel, 87 Ind. 572; Sharp v. United States, 4 Watts, 21, 28 Am. Dec. 676; Duncan v. United States, 7 Pet. 435; Pawling v. United States, 4 Cranch, 219; Clements v. Cassilly, 4 La. Ann. 380.

Other cases, while denying that a bond which has been delivered without being executed by all the parties named in the body of the instrument is presumptively void, adhere to the rule that its incomplete appearance has the effect to cast upon the obligee the burden of showing that the delivery was made by the consent of the party signing it, or under circumstances estopping him to deny such consent: Mullen v. Morris, 43 Neb. 596, 62 N. W. 74; Middleboro Nat. Bank v. Richards, 55 Neb. 682, 76 N. W. 528; Bank v. Evans, 15 N. J. L. 155, 28 Am. [292] Dec. 400. These holdings are in no manner inconsistent with the rule announced by us in Benton County Bank v. Boddicker, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632, and sustained by many eminent authorities, that where the bond is perfect on its face, and the obligee receives it without notice of any condition attached to its execution by a surety, it is binding upon the latter, notwithstanding his signature was obtained upon the assurance that others were also to join in the obligation: Carter v. Moulton, 51 Kan. 9, 37 Am. St. Rep. 259, 32 Pac. 633; State v. Allen, 69 Miss. 508, 30 Am. St. Rep. 563, 10 South. 437; Dair v. United States, 16 Wall. 1; McCormick v. Bay City, 23 Mich. 457.

Under the law as indicated by the authorities we have cited, we think there can be no recovery upon the bond in suit in the absence of an affirmative showing by plaintiffs that the surety consented to its delivery in its incomplete and defective condition. From this conclusion it follows that the trial court erred in charging the jury, as a matter of law, that the bond was binding upon the appellant rendering him liable to the amount of the penalty therein named for any default of Fryauf as treasurer. Most of the errors assigned upon the introduction of testimony are governed by this conclusion and need not be separately considered. Other assignments pertain to questions not likely to arise upon a retrial.

The judgment of the district court is reversed.

A Bond not signed by the principal is, according to the better rule, prima facie invalid and not binding on the sureties: See the

monographic note to Estate of Ramsey, 90 Am. St. Rep. 193; Gray v. Murphy, 134 Mo. 98, 56 Am. St. Rep. 496, 34 S. W. 1091. Compare State v. McDonald, 4 Idaho, 468, 95 Am. St. Rep. 137, 40 Pac. 312; and consult Smith v. Spragins, 109 Ky. 535, 95 Am. St. Rep. 391, 59 S. W. 855.

OFFICER v. OFFICER.

[120 Iowa, 389, 94 N. W. 947.]

EXECUTORS AND ADMINISTRATORS—Deposit of Trust Funds in Bank.—An executor has a right to deposit the trust fund of the estate to the account thereof in a solvent bank. (p. 366.)

EXECUTORS AND ADMINISTRATORS—Liability for Trust Funds Deposited in Bank.—An executor who deposits the trust fund of the estate to the account thereof in a solvent bank is not liable for any loss occurring through the failure of such bank. (p. 367.)

EXECUTORS AND ADMINISTRATORS—General Deposit in Bank.—If an executor deposits the trust fund of the estate in a bank to the account of such estate, and subject to check, without any promise on the part of the bank to keep the identical money and to return it to the executor, such deposit is a general, and not a special deposit. (p. 367.)

EXECUTORS AND ADMINISTRATORS—General Deposit of Trust Fund in Bank—Preference as to Creditors.—If an executor makes a general deposit of the trust fund of the estate to the account thereof in a bank, neither he nor the cestui que trust is in case of the failure of the bank, entitled to any preference over other creditors in respect to such deposit. (p. 368.)

G. G. Saunders and J. J. Stewart, for the appellant.

Harl & McCabe, for the appellee.

389 DEEMER, J. The firm of Officer & Pusey was a partnership doing a general banking business in the city of Council Bluffs. On September 17, 1900, it went into the 390 hands of receivers, and, on October 16th of the same year, intervener, as executor of the estate of A. Cochran, deceased, filed his claim against Officer & Pusey with the receivers, for the sum of something more than two thousand dollars, which he had deposited in the bank to the credit of "the estate of A. Cochran, deceased. J. J. Stewart, executor." He alleges that he notified the bank that this was a special trust fund which should at all times be kept on hand and subject to the order of court, and that said Officer & Pusey had notice of the character of the funds. He further pleaded that the funds in the hands of the receivers were augmented to the amount of the deposit, and that

the same, or an equal amount thereof, was still in their hands, and he asked that his claim be allowed and established as a preferred one. The facts are not in dispute. It was agreed that the claim should be treated as if made in the name of the cestui que trust; that J. J. Stewart was executor of the estate of A. Cochran, and as such deposited the money claimed by him, as stated in his application; and that such deposits were made on and after March 31, 1900, with the knowledge of the bank that they were trust funds held by Stewart. The deposits were made in good faith, and, when made, the bank was reputed to be solvent and sound. When the bank passed into the hands of the receivers there was more than one hundred thousand dollars of assets, which was more than sufficient to pay all preferred claims; and from the time the deposits were made, down to the time of the appointment of the receivers, the bank had more than one hundred thousand dollars in cash. Stewart never had an order of court to make the deposits, but acted upon his own judgment and responsibility, for the purpose of preserving and securing the funds. From time to time he drew checks in his official capacity against the funds, which were duly honored and paid.

The first question of law to be determined on this state of facts is, Was the deposit wrongful? If so, and [291] the bank had notice of the character of the funds, there is no doubt that the claim should be given a preference: Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908; Davenport Plow Co. v. Lamp, 80 Iowa, 722, 20 Am. St. Rep. 442, 45 N. W. 1049; District Tp. v. Farmers' Bank, 88 Iowa, 194, 55 N. W. 342; In re Knapp & Co., 101 Iowa, 488, 70 N. W. 626; Jones v. Chesebrough, 105 Iowa, 303, 75 N. W. 97. An executor must exercise that degree of care and prudence with reference to funds coming into his hands that ordinarily prudent men exercise in regard to their own affairs, and, in the absence of statute preventing, they may deposit the same in banks of good standing and reputed solvency: Barney v. Saunders, 16 How. 535; King v. Talbot, 40 N. Y. 76. Indeed, it seems to be generally held that a trustee who has deposited funds to a trust account in a reputable bank or banking house is not liable for any loss which may occur through failure of the bank: In re Law's Estate, 144 Pa. St. 499, 22 Atl. 831; Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; Jacobus v. Jacobus, 37 N. J. Eq. 17; People v. Faulkner, 107 N. Y. 488, 14 N. E. 415. Of course, the deposit must be made to the trust account. If the executor or trustee

makes a deposit of trust funds in his individual name, or mingles them with other funds, he is not relieved of responsibility should the funds be lost: Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274; Allen v. Leach, 7 Del. Ch. 83, 29 Atl. 1050; Corya v. Corya, 119 Ind. 593, 22 N. E. 3. Such act is in itself a conversion of the funds: Ivey v. Coleman, 42 Ala. 409.

Finding, then, that the executor was authorized to make a deposit of the money belonging to the estate, the next question is the nature of the deposit. Deposits are divided into general, special, and specific; and, in the absence of proof to the contrary every deposit is presumed to be general. In cases of general deposit, the money deposited is mingled with other [illegible] money of the bank, and the entire amount forms a single fund, from which depositors are paid. The relation of debtor and creditor is created, and, in the event of failure of the bank, all such creditors stand on an equality: Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; Long v. Emsley, 57 Iowa, 11, 10 N. W. 280; Commonwealth Bank v. Wister, 2 Pet. 318; In re Hunt, 141 Mass. 515, 6 N. E. 554; Briyn v. Bank, 9 Com. 413. A general deposit differs from a loan in that the money is left with the bank for safekeeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, and, so long as the relation is simply that of debtor and creditor, no loan is created: In re Law's Estate, 144 Pa. St. 499, 22 Atl. 831. A special deposit is created where the money is left for a safekeeping and return of the identical thing to the depositor. And a specific deposit exists when money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose: People v. City Bank, 96 N. Y. 33; Brahm v. Adkins, 77 Ill. 263; Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499; German Bank v. Foreman, 138 Pa. St. 474, 21 Am. St. Rep. 908, 21 Atl. 20. The deposit made in this case was not a special one. The bank did not receive it upon a promise to keep the identical money and to return it to the executor. It was not specific, for the bank had the right to mix the funds with other money received by it, and obligated itself simply to honor and pay the executor's checks. It did not agree to hold the same for the parties entitled thereto, but it was at all times authorized to pay out the same on checks signed by the executor, and was not bound to see that the money received thereon

went to those who were entitled to receive it. Many attempts have been made to secure priority in such cases on the theory that the deposit is specific, but they have uniformly failed: See Fletcher v. Sharpe, [393] 108 Ind. 276, 9 N. E. 142; McLain v. Wallace, 103 Ind. 562, 5 N. E. 911; Alston v. State, 92 Ala. 124, 9 South. 732; Henry v. Martin, 88 Wis. 367, 60 N. W. 263.

We have found that the deposit in this case was authorized, and that it was general in character, and the question yet remains, May the executor or his cestui que trust recover the deposit as a preferred claim? The mere fact that he is a trust fund creditor does not give him this right. Equality is regarded as equity in such cases. He is simply a creditor of the bank, and has no peculiar claim or right over other creditors: Ringo v. Field, 6 Ark. 43; Fletcher v. Sharpe, 108 Ind. 276, 9 N. E. 142; Shaw v. Bauman, 34 Ohio St. 25; Paul v. Draper, 158 Mo. 197, 81 Am. St. Rep. 296, 59 S. W. 77; National Bank v. Millard, 10 Wall. 153. In Fletcher v. Sharpe, 108 Ind. 276, 9 N. E. 142, it is said: "There is no question that the fund was properly deposited. . . . . When deposits are received, unless they are special, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust money or of funds which are impressed with no trust, provided the act of the depositor is no misappropriation of the funds. If, in receiving a trust fund, a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of a cestui que trust might be different. . . . . In this case, where no impropriety is imputed to the bank in receiving the money, it becomes the debtor of the petitioner, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance." This is manifestly sound doctrine, and does not in any manner controvert the rule that a cestui que trust may follow [394] trust property which has been misapplied or misdirected by a trustee into the hands of anyone who is not an innocent purchaser for value. Generally speaking, equity will follow a trust fund through any number of transmutations, and preserve and protect it for the real beneficiary, so long as it can be identified and followed; and no court has gone further than our own in this respect. But where the property has rightfully been disposed of by the trustee, and

title has passed from him, the cestui que trust will not be permitted to reclaim the same. Hence the necessity for determining the rightfulness of the deposit. When it is once determined that the deposit was rightful, the case assumes the same aspect as if the cestui que trust had expressly authorized it. Had he done so, of course he could not follow the property into the hands of the receivers. In virtue of the power conferred upon him by law, the executor deposited the money in the bank, and thus became the bank's creditor for the amount of the deposit. The money was properly mingled with other funds of the bank, and lost its distinctive character as trust funds. The bank became obligated to return a like amount to the executor, or to honor his checks issued against the deposit. In other words, it became the debtor of the trustee. And, as said in Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472, referring to Cavin v. Gleason, 105 N. Y. 262, 11 N. E. 504, "that plaintiff was a trust creditor does not of itself entitle him to preference over other creditors." The executor had the right to make the deposit, and the bank had an equal right to use it in its business in the ordinary way. The fund stood on the same footing as any other general deposit: McAfee v. Bland, 11 Ky. 1, 11 S. W. 439.

The case is easily distinguishable from cases where the deposit is wrongful, for there the relation of debtor and creditor does not exist; at any rate, the cestui que trust is not bound by such a deposit. It is also very different from those cases where a bank, with notice of the trust [395] character of a deposit, attempts to apply it on a debt due it by the trustee. In such cases, the cestui que trust may recover the amount so misapplied from the bank. It is doubtless true, also, that the cestui que trust may recover from a solvent bank the amount of a deposit by another to his account as trustee, but none of these rules are applicable here, for the reasons that the deposit was rightful, the relation of debtor and creditor was created, and the entire assets of the bank are now in the hands of trustees for an equitable and proper distribution. There is no reason, then, for preferring one creditor over another, and surely none will be preferred simply because he is what might be called a trust fund creditor.

In Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504, relied upon by appellant, a trustee who had wrongfully dissipated and lost a trust fund made an assignment for the benefit of creditors and the cestui que trust sought to have a preferential claim es-

tablished out of the assets of the trustee. The claim was denied, because the cestui que trust could not show that the funds were included in the assets, either in the original or a traceable form. The court there said: "It is clear that a trust creditor is not entitled to a preference over general creditors of an insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. . . . . The equitable doctrine, that as between creditors equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific, recognized equity, founded on the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court, [396] doubtless, may order it to be restored to the trust. . . . . This rule simply asserts the right of the true owner to his own property." This rule was approved in Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472. It manifestly has no application where the trustee has rightfully disposed of the trust property, and the cestui que trust is attempting to enforce a preferential claim against the debtor for that property.

In the case of Jones v. Chesebrough, 105 Iowa, 303, 70 N. W. 626, 75 N. W. 97, it was assumed, without deciding the point, that money rightfully deposited might be followed into the hands of an assignee of an insolvent bank. But as the case turned on the claimant's inability to trace his property, there was no necessity for deciding the other point, and that case should not be regarded as an authority in support of intervener's claim.

None of the cases cited by appellant reach the exact point for decision here, and we have been unable, after a somewhat laborious search, to find any that does sustain his contention. On the other hand, there is abundant authority for the positions we have taken, which are to the effect that the deposit was rightful, was general in character, and that the executor, or the estate which he represents, is a creditor of the bank, having no peculiar equities over those of any other creditors, and consequently is not entitled to have his claim established as a preferential one.

The ruling of the district court was correct, and it is affirmed.

DEPOSIT OF TRUST FUNDS IN BANK BY EXECUTORS OR ADMINISTRATORS.

I. Duty to Deposit.
II. Liability for Loss Through Failure to Deposit.
III. Liability for Loss Through Failure of Bank.
a. Deposit to Credit of Trust Estate.
b. Deposit in Individual Name.
c. Deposit in Official Capacity.
d. Deposit Made by Decedent Continued by Representative.
IV. Liability for Allowing Fund to Remain in Bank an Unnecessary Time.
V. Liability for Interest.

I. Duty to Deposit.

As announced in the principal case, an executor or administrator must exercise that degree of care and prudence with reference to funds of the estate coming into his hands that ordinarily prudent men exercise in regard to their own affairs, and it must naturally follow that he has a right to deposit such funds to the account of the estate in a bank then in good standing and of reputed solvency. Indeed, he not only has such right, but it seems that he must, when reasonably convenient, make such deposit of the trust funds or money of his estate: Succession of Pasquier, 11 La. Ann. 279; Dalrymple v. Gamble, 68 Md. 156, 11 Atl. 718; Matter of Philp, 29 Misc. Rep. 263, 61 N. Y. Supp. 241; Riley v. McInlear's Estate, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996.

II. Liability for Loss Through Failure to Deposit.

The liability of an executor or administrator as to the money of an estate in his hands is that of an ordinary bailee for hire. He is not regarded as an insurer, and is not liable for the loss of such property where he has shown good faith, and has acted with the diligence usual with good business men under similar circumstances. Ordinary diligence, or that which persons of the same class, of average prudence, are accustomed to bestow upon their own property of like kind, and under similar circumstances is all that the law exacts of him, and this rule is to be practically applied by a common sense standard of comparison. Hence, it has been held that if an administrator collects three thousand dollars near where he lives, which is fifteen miles from the county seat, and keeps it for a few weeks, and, on going to make his settlement at such county seat, is robbed of the money while on the way, he is not guilty of gross negligence in failing to make a deposit of the money in bank before the time of such robbery, nor chargeable with such want of ordinary care as to render him personally liable for its loss, or prevent him from obtaining credit for it on a settlement of his administration account: Lehman v. Robertson, 84 Ala. 489, 4 South. 728. And if money belonging to the estate is stolen by burglars

from the safe of the administrator, the court, upon being satisfied that he has not been guilty of a want of due care in not depositing such money in bank, will discharge him as to the money so lost on the settlement of his account: Stevens v. Gage, 55 N. H. 175, 20 Am. Rep. 191. To the same effect, Fudge v. Durn, 51 Mo. 264. On the other hand in Cornwell v. Deck, 8 Hun, 122, it appeared that an administratrix kept a large amount of money belonging to the estate in a trunk in a bedroom in her home; that part of such money had been thus kept for more than one year, while the nearest bank was twelve miles from where she lived. The money was stolen and when she asked for a credit for it on a settlement of her account, the court held that had the money been only a portion of the estate lately collected, and had the remainder been deposited in bank, she might have been held authorized to keep the money where she did until a proper opportunity to deposit it in bank occurred, yet, as nearly all of the fund had been allowed to remain in such an insecure place for nearly a year before it was stolen, this shows such a violation of the ordinary laws of care and prudence as constituted gross negligence, and make such administratrix personally liable for the loss of the money thus stolen.

III. Liability for Loss Through Failure of Bank.

a. Deposit to Credit of Trust Estate.—An executor or administrator cannot be held personally liable if, in the ordinary discharge of his duty, he deposits the assets of the estate temporarily in a bank of good repute for solvency, though such bank afterward fails. Generally speaking, to shield him from responsibility, the deposit must be made in the name of the trust estate, unmixed with the depositor's own funds: Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; Harding v. Canfield, 73 Minn. 244, 75 N. W. 1112; People v. Faulkner, 107 N. Y. 477, 14 N. E. 415; Sheerin v. Public Administrator, 2 Redf. Surr. 421; Estate of Law, 144 Pa. St. 499, 22 Atl. 831; Appeal of Robinson, 2 Walk. (Pa.) 544; Fitzsimons v. Fitzsimons, 1 S. C. 400; Twitty v. Houser, 7 S. C. 153. In other words, an executor or administrator who deposits the money of the estate in good faith in a then solvent bank of good repute to the trust account, and not to his own account or credit, is not liable for the loss of such money, or some part thereof, through the subsequent insolvency or failure of the bank: In re Kohler's Estate, 15 Wash. 613, 55 Am. St. Rep. 904, 47 Pac. 30. If an administrator, acting in good faith, makes a deposit in bank of funds belonging to the estate he represents and to the credit thereof, either from necessity or convenience for a reasonable time, awaiting an order for distribution, a failure of the bank does not cast the loss of the deposit on him: Caruthers v. Caruthers, 99 Ill. App. 403. The test of the liability of an executor or administrator for the loss of the trust funds thus deposited in a bank

which afterward fails is whether he honestly exercised in the premises that degree of care which men of common prudence ordinarily exercise in their own affairs: Harding v. Canfield, 73 Minn. 244, 75 N. W. 1112. "The uniform holding of courts has been that executors, administrators, and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee, and, where such a one in good faith deposits money in a bank of good repute to the trust account, he ought not to be held liable for its loss in consequence of the failure of the bank": In re Kohler's Estate, 15 Wash. 613, 55 Am. St. Rep. 904, 47 Pac. 30. "The proper inquiry is, Was the act of the administrator, under the circumstances, induced by that reasonable care with which prudent men, looking to their benefit, usually conduct their own business? The proceedings which were to determine the application of the money held by the administrator were still pending in court. The deposit was made in a bank paying interest, and the only institution of the kind in the county where the letters of administration had been granted. At the time of the deposit it was in such good standing as to commend itself generally to the community, which is shown by the fact that the merchants, lawyers, officers of the court, and persons resident in and about the town, including several of the county treasurers, made it a place for the deposit of money. To make the administrator liable for the loss which followed from no fault on his part would inflict upon him a punishment for not foreseeing what others having a better opportunity failed to perceive in time to save them from a consequent loss": Twitty v. Houser, 7 S. C. 164. Of course an executor or administrator who deposits the trust funds of the estate in a bank known by him at the time to be insolvent, or in failing circumstances, will be liable for the resulting loss. Thus, if an administrator of an estate deposits in a failing bank, of which he is cashier, and with whose condition he is entirely familiar, moneys of the estate of his intestate, he or his estate is properly charged with any loss of such money occurring from the failure of the bank, especially if it fails shortly after such deposit is made: Matter of Scudder, 21 Misc. Rep. 179, 47 N. Y. Supp. 101.

b. **Deposit in Individual Name.**—If an administrator or executor deposits the funds of the estate with a commercial house, or in a bank, in his own name and to his own credit, he thereby becomes personally responsible to the estate for the amount of the deposit: Succession of Lagarde, 20 La. Ann. 148; Succession of Milmo, 47 La. Ann. 126, 16 South. 772; McAllister v. Commonwealth, 30 Pa. St. 536; Vaiden v. Stubblefield, 28 Gratt. 153. If he deposits the trust funds in his own name, in a bank or other institution, which fails, the loss will fall upon him: Allen v. Leach, 7 Del. Ch. Rep. 83, 29 Atl. 1050; Commonwealth v. McAllister, 28 Pa. St. 480. If he places the funds of the estate in bank to his individual credit, it is an appropriation

of them to his individual use, and he becomes liable for them upon the failure of the bank, although he has no money of his own on deposit therein: Summers v. Reynolds, 95 N. C. 404. His liability does not depend upon the good faith, prudence, or judgment with which he may have apparently acted, nor upon the fact that he may have deposited his own funds in the same way: Commonwealth v. McAllister, 28 Pa. St. 480. An administrator who deposits funds of the estate in a bank in his own name, without any designation or indication of his representative capacity, is personal liable for the loss of the deposit, resulting from a failure of the bank, although he has no other funds on deposit therein, and places the money in the bank for the express purpose of keeping it separate from his individual funds, and the bank is of good credit and standing, and is by him believed to be safe and solvent. In such case the good faith or intention of the administrator in thus making the deposit is in no way involved: In re Arguello, 97 Cal. 196, 31 Pac. 937. If he deposits funds of the intestate's estate in a bank in his individual name, but informs the teller of the bank at the time that it belongs to the estate, and it is not mingled with his individual funds, but is mingled with other trust funds therein, and in his custody, and the bank fails, he is liable for the loss: Harward v. Robinson, 14 Ill. App. 560. If he deposits funds of the estate in a bank in his individual name and to his own credit, he is liable to the estate therefor upon the failure of the bank, although he had no other deposit therein, and informed the officers of the bank at the time of depositing that the funds were in trust: Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 208, 12 N. W. 465, 13 N. W. 274. An administrator is not entitled to a credit for the amount of a deposit in his own name, lost by the failure of the bank in which he has placed it, although the deposit was made with the intention, known only to himself, that it should be kept there to replace or repay the amount of trust funds used by him: Ditman v. Bogle, 53 Ala. 169. If he deposits trust funds in bank in his own name and takes a certificate of deposit payable to his own order, he is liable for any loss caused by the failure of the bank and liable to account therefor: Corya v. Corya, 119 Ind. 593, 22 N. E. 3. If he deposits the funds of the estate which he represents in a bank and receives a certificate of deposit payable to his order at a specified time after its date, with interest, such a deposit is evidence of a loan by him of such funds, and upon the failure or insolvency of the bank, he will be liable for any loss resulting therefrom: Baers' Appeal, 127 Pa. St. 360, 18 Atl. 1; Caruthers v. Caruthers, 99 Ill. App. 403. So, if an executor deposits the funds of the estate of his testator in bank and takes therefor a certificate of deposit in his own name individually, the deposit is at his own risk, and a loss happening upon the failure of the bank will therefore fall on him and not on the estate. Nor will the fact that he informed the bank at the time of deposit that the

funds belonged to an estate of which he was the executor alter his liability: In re Estate of Homer, 66 Mo. App. 531. The case of Atterberry v. McDuffee, 31 Mo. App. 603, is opposed to this doctrine, as it was therein held that a bona fide deposit of trust funds in a bank in the executor's own name, and the issue by the bank of a certificate of deposit to him, with knowledge on the part of the bank that it was a trust fund, will, where there is no mingling of the fund with the individual money of the executor, protect him against loss caused by the destruction or failure of the bank.

c. **Deposit in Official Capacity.**—An executor or administrator who deposits money of the estate to his credit, in his official capacity in a solvent bank of good standing, is not liable for its loss through the insolvency or failure of such bank: Jacobus v. Jacobus, 37 N. J. Eq. 17; Cox v. Roome, 38 N. J. Eq. 259. So, if he holds a fund for investment which he is reasonably unable to invest, and with the assent of the cestui que trust, deposits it in bank of good repute and credit at interest in his official name, and separate from his individual account, he should not be held liable for its loss by the failure of the bank, in which he is a director and borrower, and whose duty it is to examine its affairs, if it appears that he believed in good faith that such bank was in good financial condition, and it is not shown that he was able to learn to the contrary: Matter of Maxwell, 23 Abb. N. C. 23, 3 N. Y. Supp. 422.

d. **Deposit Made by Decedent Continued by Representative.**—Good faith and the exercise of ordinary care and reasonable diligence are all that can be required of an executor or administrator in the execution of the trust. Hence, if he is not guilty of gross negligence, the fact that he leaves or continues a deposit of money in bank as made by the decedent and upon the same terms, he is not liable for its loss by the failure of such bank: Hanbest's Appeal, 92 Pa. St. 482. Or, if he, upon taking office, finds a considerable sum to the credit of the estate in a bank of good repute for solvency, and from time to time adds other funds to such deposit, paying out the money as rapidly as those who are entitled to would receive it, he is not guilty of a devastavit nor liable for its loss upon the failure of the bank in which it is deposited: Moore v. Eure, 101 N. C. 11, 9 Am. St. Rep. 17, 7 S. E. 471.

IV. Liability for Allowing Fund to Remain in Bank an Unnecessary Time.

If an executor or administrator deposits the money of an estate in bank and allows it to remain after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled to it, he is guilty of negligence, and if the bank then fails and the money is lost, he and his sureties are liable therefor: McNabb v. Wixom, 7 Nev. 163. Or if he leaves the funds of the estate in bank for more than two years when all of the debts of the

estate are not paid, and until a suspension of the bank or of specie payments, he is liable to the heirs for any loss occasioned thereby, on the ground of want of reasonable care and diligence: Mandeville v. Arnold, 9 Rob. 447. If an executor keeps the funds of the estate in a bank needlessly for more than three years after the testator's death, and during that time pays the debts of the estate out of his own private funds, though the fund in bank is ample for that purpose, he is negligent and not entitled to credit for such gratuitous payment in settlement with the legatees: Woodley v. Holley, 111 N. C. 380, 16 S. E. 419. The same rule applies to an administrator under the same facts: Guthrie v. Wheeler, 51 Conn. 207. Or if an administrator leaves the funds of the estate on deposit in bank for more than five years, not making any effort during his administratorship to settle the estate, he is not entitled to credit for the loss of the money through the insolvency of the bank, although the circumstances attending such deposit and loss are not otherwise negligent: Wood v. Myrick, 17 Minn. 408.

V. Liability for Interest.

If an executor or administrator keeps the money of an estate deposited in bank to the credit of accounts in which the money used in the transaction of his ordinary business is kept, and on which he regularly draws in the transaction of his individual business, he makes use of the money of the estate in such a way that he must, as a general rule, pay interest on it to the estate: Ivey v. Coleman, 42 Ala. 409; Green v. Hussey, 96 Mo. App. 295, 70 S. W. 156; Frey v. Demarest, 17 N. J. Eq. 71. Or, if an administrator who conducts a private bank deposits therein the funds of the estate of his intestate and places them to the credit of such estate, he is in the same situation as an individual who mingles estate money with his own, and is therefore chargeable with interest: Matter of Thorp, 31 Misc. Rep. 581, 65 N. Y. Supp. 575. But such officer can never be charged more than simple interest on funds of the estate which he has deposited in bank and mingled and loaned with his own, especially when he so acts in good faith: Perkins v. Hollister, 59 Vt. 348, 7 Atl. 605. And it has been held that mere evidence that an administrator mingled the funds of the estate with his own does not justify charging him with interest thereon, and evidence that he deposited the money of the estate in a bank managed by his brother, who was a surety on his bond, does not justify a finding that he embezzled the funds of the estate, or warrant charging him with compound interest thereon, in the absence of proof that the bank made any other use of such funds than that made by banks of deposit in general. In such case he is not liable for simple interest on the fund, unless it is shown that some loss has occurred through his negligence or fault, or willful violation of duty: Estate of Sarment, 123 Cal. 331, 55 Pac. 1015; citing with approval, Wheeler v. Bolton, 92 Cal.

159, 28 Pac. 558. If an administrator, with the knowledge and without the objection of the legatee, deposits funds of the estate from year to year, for its benefit, in a savings bank in good standing and credit, he cannot, upon the failure of the bank, be held liable for the loss of such fund, nor for interest thereon: Fitzsimons v. Fitzsimons, 1 S. C. 400. If an administrator in good faith deposits the money of the estate in a bank to the credit of the estate, and such bank does not pay any interest on such deposit, the administrator cannot be charged interest thereon: Scudder v. Ames, 89 Mo. 496, 508, 14 S. W. 525. It has been held that an administrator must deposit the moneys of his estate in a bank or interest paying concern, and that if he fails to do so, he is chargeable with the interest that such money would have earned if thus deposited. He cannot, however, be charged with any higher rate unless he has been guilty of willful misconduct: Matter of Philp, 29 Misc. Rep. 263, 61 N. Y. Supp. 241. So an executor or administrator is chargeable with interest, at the rate he might have obtained on the funds of the estate which he unnecessarily detains and keeps in his hands without depositing them, when there are banks of deposit easily accessible, in which he could have deposited such funds at interest: Woods v. Creditors of Eames Estate, 4 Vt. 256; Riley v. McInlear's Estate, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996. An administrator who admits that he has received a certain rate of interest on all funds of the estate deposited by him in bank is accountable for interest at that rate, not only on the funds actually deposited, but also on other estate funds in his hands which he ought to have deposited: Dalrymple v. Gamble, 68 Md. 156, 11 Atl. 718. If a will directs that the estate be put at interest by the executor and he fails to do so, and keeps the funds in his hands, he must be considered a borrower, and annually charged with simple interest at the legal rate, and such interest in preference to any part of the principal must be applied to his disbursements on behalf of the estate: Garrett v. Carr, 3 Leigh, 407; Handly v. Snodgrass, 9 Leigh, 484.

JELLY v. MUSCATINE CITY AND COUNTY MUTUAL AID SOCIETY.

[120 Iowa, 689, 95 N. W. 197.]

BENEFIT SOCIETIES—Suspension of Member—Failure to Pay Dues.—A mere delinquency of a member of a mutual benefit association in the payment of dues or assessments does not defeat his good standing so long as he has a right to pay and the association forbears to take action. (p. 379.)

BENEFIT SOCIETIES—Suspension of Member for Nonpayment of Dues.—A provision in the constitution of a mutual benefit association that a member failing to pay his assessment within a certain time after notice of delinquency shall be suspended, is not self executing, but merely declaratory of the right to suspend for nonpayment of an assessment, and membership or good standing is not lost or forfeited so long as the association does not act. (p. 380.)

E. M. Warner, for the appellants.

Jayne & Hoffman, for the appellee.

[689] BISHOP, C. J. The certificate upon which suit is brought was issued by the defendant society to J. A. Jelly in his lifetime, the date thereof being April 3, 1889. This plaintiff, widow of said J. A. Jelly, is the beneficiary named in such certificate. The certificate is set out by copy in the petition, and therein it is provided that upon the death of said J. A. Jelly his beneficiary shall be entitled to participate in the beneficiary fund of the society to the amount of one dollar for each valid certificate then in force; this, however, upon the condition that said Jelly shall have complied in every particular with all the laws, [690] rules, and requirements of said society. It is alleged that Jelly died March 31, 1900; that proper proofs of death were furnished to defendant; and that payment has been demanded and refused. The answer admits the issuance of the certificate and the death of Jelly. It is then alleged that the defendant society is one organized for the mutual benefit of its members, and that by its constitution it is provided, among other things, as follows:

"Art. 9. Upon notification of the death of a member by the secretary, each surviving member shall pay to the secretary the sum of one dollar; and if not paid within fifteen days, the party failing to pay shall be suspended from all benefits of the association.

"Art. 10. When a member has been suspended for nonpayment of assessments, it shall be the duty of the secretary to

notify such member of the facts, and if such member pays up all arrearages within thirty days therefrom, he shall be reinstated without action of the association; otherwise he shall be dropped from the roll of membership."

The allegation follows that on March 1, 1900, one Gergen, a member of said society in good standing, died, and that on March 5, 1900, notice of such death was given to said J. A. Jelly, and that he, said Jelly, failed and neglected to pay to the secretary the sum of one dollar as provided for by his contract with the society; and defendants say that by reason of such failure and neglect said Jelly became suspended from all benefits in the society. In the demurrer to such answer it is said that the matters set up therein do not constitute any defense to plaintiff's action, for that it does not appear therefrom that said Jelly had ever been suspended from said society, or that he was not in good standing at the time of his death.

We think the demurrer was properly sustained. It is clear that the latter clause of article 9 of the constitution which we have quoted was not intended to be self-executing. [691] Some affirmative action on the part of the association was contemplated before the certificate holder should become suspended. The expression "shall be suspended," as the same appears in said article, is declaratory merely of the right of the association to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action. This conclusion finds ample support in the authorities. Among others that might be cited, see the following: Warwick v. Supreme Conclave, 107 Ga. 115, 32 S. E. 952; Petherick v. General Assembly, Order of Ameranth, 114 Mich. 420, 72 N. W. 262; Northwestern etc. Assn. v. Schauss, 148 Ill. 304, 35 N. E. 747; Puhr v. Grand Lodge, 77 Mo. App. 47; 21 Am. & Eng. Ency. of Law, 292; Bacon on Mutual Benefit Associations, sec. 385.

It may be conceded that a mutual benefit society may so provide in its contracts of membership that a mere failure to pay assessments, without more, shall operate ipso facto to forfeit all the rights of the delinquent member. To this effect are the cases of Bosworth v. Western Mut. Aid Soc., 75 Iowa, 582, 39 N. W. 903, and Leffingwell v. Grand Lodge, A. O. U. W. 952,

86 Iowa, 279, 53 N. W. 243, cited and relied upon by appellant. But the contract of membership exhibited in the case at bar contains no such self-executing provision. On the contrary, it provides by fair construction not only for affirmative action on the part of the society, but for thirty days of grace to the member after he is notified of such action. In contracts of this character, force is to be given the provisions thereof which will sustain the contract rather than work a forfeiture: Warwick v. Supreme Conclave, 107 Ga. 115, 32 S. E. 952; McMaster v. New York Life Ins. Co. (C. C.), 90 Fed. 40.

It follows from what we have said that the judgment of the court below should be, and it is, affirmed.

For Authorities bearing upon and supporting the decision in the principal case, see the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 574; Pitts v. Hartford etc. Ins. Co., 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; Grand Lodge etc. v. Marshall, 31 Ind. App. 534, 99 Am. St. Rep. 000, 68 N. E. 605.

LUCAS v. WHITE.

[120 Iowa, 735, 95 N. W. 209.]

DOWER.—Statute of Limitations does not begin to run against the wife's right of dower until the death of her husband, even though a title by adverse possession has fully ripened as against him before his death. (p. 382.)

Jayne & Hoffman, for the appellant.

O. A. Byington and Titus & Jackson, for the appellee.

736 WEAVER, J. Plaintiff married Edward W. Lucas, in December, 1852, and said marriage relation continued until the death of the husband in the year 1900. In the year 1853 Edward W. Lucas and Gilman Folsom together obtained title from the United States to the northwest quarter of the southeast quarter and the south one acre of the southeast quarter of the southwest quarter of section 18, township 78 north, of range 3 west, in Muscatine county, each of the said parties being vested with an undivided half in said lands. The plaintiff never conveyed away or joined in any deed relinquishing her inchoate right in said property, and upon the death of her husband brought this action to have admeasured and set apart to her, as the widow of the said Edward W. Lucas, the one-third in value of the one-half of said lands. The defendant resists her claim,

denying her right to the relief sought, and alleges title in himself by deed made by one Null to Hezekiah Pray in the year 1855, and from Pray through several intermediate grantees to himself. He further alleges continuous, adverse possession in himself and his said grantors during all said period from 1855 to the present time, and that plaintiff's right of action is barred by the statute of limitations. This issue of the statute of limitations, which was determined by the trial court upon demurrer adversely to the defendant, is the only question presented in argument.

The statute provides, in effect, that the time limitation upon the right of action begins to run from the time when the "cause" thereof accrues: Code, sec. 3447. If, then, plaintiff's cause of action accrued to her when the alleged adverse possession was initiated in the year 1855, her action is manifestly barred; but, if the cause accrued only upon the death of her husband in the year 1900, it is equally manifest that the bar has not arisen and the judgment of the district court is right. The action is brought, as we have seen, to enforce a right which could mature only upon the death of the husband. During his [737] lifetime the right was inchoate only, and would die with the wife, if she did not outlive him. In the very nature of things, there could be no admeasurement of common-law dower or statutory distributive share in the husband's estate during his lifetime, and, such being the case, it appears clear that the statute has not run against plaintiff's demand. It is urged, however, that the courts recognize the inchoate right of the wife in her husband's lands as having the elements of property, and actions have been upheld for its protection, even in the lifetime of the husband. From this premise the conclusion is drawn that, as plaintiff sought no such remedy or protection during the long period between the years 1855 and 1900, she is barred from now asserting her claim. We think that it will be difficult to find any well-considered decision supporting this contention. The cases cited—Buzick v. Buzick, 44 Iowa, 259, 24 Am. Rep. 740, and Madigan v. Walsh, 22 Wis. 501, and others of that class—do not go to the extent claimed for them.

The utmost of these holdings is that where, by some fraud or mistake, the title of the husband has been so devested as to apparently devest the wife's interest also, she may maintain an action, not to recover the property or to set apart any share therein, but to remove the cloud upon her inchoate right. For example, in the Buzick case the husband, in collusion with

his son, permitted the latter to obtain a sheriff's deed to the former's property in order to defraud the wife, while in the Madigan case the wife had been induced by fraud to execute a deed relinquishing her right. It may well be that where, by fraud or mistake, the wife's inchoate interest has been apparently extinguished or released, if she permits the record to remain in that condition without some action to cure it, the statute of limitations will run against her even in the husband's lifetime; but this we are not now required to [738] decide. It is an altogether different proposition to say that when, by the misfortune, neglect, or thriftlessness of the husband, a third party succeeds in acquiring title by adverse possession against him, the loss of the husband's ownership works an extinguishment of the wife's contingent interest. The only case in which we have touched directly upon this question is Hurleman v. Hazlett, 55 Iowa, 256, 7 N. W. 600. In that controversy, a wife, being the owner of land, conveyed it by deed in which the husband did not join. After more than ten years the purchaser brought action to quiet his title against the husband (who was still living), alleging adverse possession as the ground for relief, and we held in clear and explicit language that the husband's right "cannot be so barred." The principle there recognized seems equally applicable to the present appeal. Such, indeed, is the almost universal holding of the courts of other states. The decisions very generally are to the effect that, as the wife's right in her husband's land during his lifetime is contingent upon her survivorship, and gives her no right of disposition, entry, or possession, independent of her husband, the statute of limitations does not begin to run against her until her interest has become mature by his death, even though a title by adverse possession has fully ripened as against him before his decease. Directly in point are Steele v. Gellatly, 41 Ill. 39; Taylor v. Lawrence, 148 Ill. 388, 36 N. E. 74; Williams v. Williams, 89 Ky. 381, 12 S. W. 760; Miller v. Pence, 131 Ill. 122, 23 N. E. 1030; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853; Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; Smith v. Myers, 7 Ky. Law Rep. 443; Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 126; Smith v. Wehrle, 41 W. Va. 270, 23 S. E. 712; Hart v. McCollum, 28 Ga. 478; 2 Scribner on Dower, 579; 1 Washburn on Real Property (1862), 218, 250. When right of dower once attaches, the husband [739] cannot defeat it by any act or admission on his part; and neither his laches, default,

covin, nor crime will be permitted to prejudice her right: Williams v. Courtney, 77 Mo. 588; Grady v. McCorkle, 57 Mo. 172, 17 Am. Rep. 676.

Ordinarily, the wife cannot relinquish her dower right in the husband's lifetime, except in the manner provided by statute: Mason v. Mason, 140 Mass. 63, 3 N. E. 19. Dower has long been accorded the careful guardianship of the courts. Lord Coke is quoted as saying, "There are three things highly favored in law—life, liberty, and dower," and McKean, C. J., in Kennedy v. Nedrow, 1 Dall. 415, says of it, "It is favored in a high degree by law, and, next to life and liberty, held sacred." The only cases coming under our observance tending to support the appellant's theory are Winters v. De Turk, 133 Pa. St. 359, 19 Atl. 354, and Keys v. Keys, 58 Tenn. 425. In the former it seems to be held by way of dictum that adverse possession by a disseisor, which ripens into a title against the husband in his lifetime, will bar a claim of dower by the wife; while in the latter case the doctrine contended for by appellant is fully sustained. The clear weight of authority, however, is with the appellee. We are cited to numerous cases holding that adverse possession for the requisite period ripens into an indefeasible title. The conclusion we have reached is not a departure from that rule. Our decision is based upon the proposition that there was no adverse possession by defendant and his grantors as against the plaintiff's demand until after her husband's death. This involves a consideration of the nature of adverse possession. It has been defined as possession by one person which is inconsistent with possession or right of possession by another: Sheaffer v. Eakman, 56 Pa. St. 144; Morse v. Seibold, 147 Ill. 318, 35 N. E. 369. In theory it is a possession founded in trespass or disseisin; an ouster of the true owner, and the continued exclusion of such owner for the [740] period of the statute of limitations: Olewine v. Messmore, 128 Pa. St. 484, 18 Atl. 495; Bryan v. Atwater, 5 Day, 181, 5 Am. Dec. 136; Davis v. Bowmar, 55 Miss. 671. Adverse possession cannot arise until there is some one to dispute the right claimed: Marble v. Price, 54 Mich. 466, 20 N. W. 531.

But in the case before us there was neither title nor possession nor right of possession in the plaintiff during her husband's lifetime, and defendant's possession, not being inconsistent with her inchoate right, cannot be said to have been in hostility to it, and was, therefore, not adverse. Her interest in the land was contingent only; a mere possibility, dependent

entirely upon her survivorship. As to her, there was never any actual or constructive ouster. As she was never seised of the title, or any part thereof, until the husband's death, there was no disseisin in fact or in law. She had no claim upon the rents or profits, and was not chargeable with taxes or repairs. She could not maintain action of trespass against the persons in possession. There was no apparent release or judicial sale requiring action by her to remove a cloud so created upon her right. If defendant and his grantors had obtained their title through a deed from the husband in which the wife did not join, probably no one would contend that such conveyance and possession under it, no matter how long continued prior to the husband's death, would bar the wife's right of dower if she outlived him. Upon what principle shall we say, in the absence of statute to such effect, that a title obtained in hostility to the husband shall be more effective to eliminate the rights of the wife than a voluntary conveyance by him. If we do so decide, then we hold, in effect, that a wrongdoer may demand greater favor at the hands of the court than one who keeps strictly within the limits of his legal rights; for the grantee in the deed takes and holds possession as the true owner, while, as we have seen, adverse possession is [741] founded upon the idea of a protracted ouster or disseisin of the true owner. In the absence of a statute to that effect, a sale upon judicial proceedings against the husband does not extinguish the dower right of the wife, and she may enforce it against the purchaser at such sale if she survive the husband: Pense v. Hixon, 8 Iowa, 402. In some states it is held that a tax sale will not operate to extinguish dower: Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; Shell v. Duncan, 31 S. C. 547, 10 S. E. 330. But in this state a tax title is considered, not as being derivative from the delinquent taxpayer, but as a new and independent title, granted by the sovereign power of the state, and as extinguishing all claims based upon the old title: Bull v. Gilbert, 79 Iowa, 547, 44 N. W. 815; Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. 1062.

Much of the seeming difficulty in this class of cases is obviated by remembering that the widow's right of dower is not like that of an heir derived by descent from the husband, nor does it date from his death. The right becomes complete in her the instant there is a concurrence of seisin in the husband and marriage relation between the parties. It is not called into

existence by the grant or grace or favor of the husband, and the wife holds it wholly independent of him. It is said in Park on Dower, page 237, to be "a right attaching by implication of law, which, although it may never be called into effect (as when the wife dies in the lifetime of the husband), yet from the moment the fact of marriage and of seisin have concurred, it is so fixed upon the land as to become a title paramount to that of any person claiming under the husband by any subsequent act. After this right has once attached, it is held by the wife entirely independent of her husband, and it cannot be affected by any act or omission on his part": Cunningham v. Shannon, 4 Rich. Eq. 140; Tibbetts v. Langley, 12 S. C. 465. And, while her right becomes [742] effective only upon the husband's death in her lifetime, her dower attaches to the land, not from the date of his decease, but from the date when her inchoate right had its origin.

Counsel argues that this conclusion renders possible the existence of two or more dower estates in the same land because in the time between the years 1853 and 1900 several different persons may each have successively acquired an independent title to the land by adverse possession, and, if all die leaving widows, each relict, under the doctrine here approved, may be dowable in the same premises. But the spectacle of two dowers in the same estate is by no means unknown: McLeery v. McLeery, 65 Me. 173, 20 Am. Rep. 683. Such complications may easily exist even without the intervention of adverse possession or the statute of limitations. Instead of counsel's illustration of five successive owners by adverse possession, let us assume five successive owners by deed of the same land in five successive days, each of the owners being a married man, whose wife does not join in the conveyance. If then on the sixth day these five men perish in some calamitous accident, each of the five widows will have an undoubted right to dower in the land which has been the subject of the transfers of title. This does not cast upon the court, as the counsel seems to think, the problem of finding "five-thirds" in a single item of property, for each of the subsequent grantees took the title subject to the unreleased inchoate dower rights already existing in the land; and the right of his widow to dower is not to the one-third of the whole, but to the one-third of whatever remains after setting off the share or shares of those who are prior in order of time.

The question whether the plaintiff's dower is to be measured and governed by the law as it existed in 1855 or by the present statute, and of the rights of the parties in respect to improvements on the land, is not presented by the record, and need not be considered.

The judgment of the district court is affirmed.

The Statute of Limitations does not begin to run against the inchoate dower interest of a wife until the death of her husband: Thompson v. McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211. See, in this connection, Beall v. McMenemy, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

LOUISVILLE v. LOUISVILLE RAILWAY COMPANY.

[111 Ky. 1, 63 S. W. 14.]

MUNICIPAL CORPORATION cannot Compromise Claim for Taxes.—Under a constitutional provision that "the general assembly shall have no power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, of the indebtedness or liability of any corporation or individual to this commonwealth, or to any county or municipality thereof," the general council of a city cannot compromise a claim for taxes at less than the amount due after the assessment has been regularly made and the claim has come into the hands of the collecting officer. (p. 397.)

MUNICIPAL CORPORATION—Compromise of Taxes.—A City Attorney has no authority, either before or after suit is brought for taxes, to compromise and take less than is shown to be due from the taxpayer. (p. 398.)

Henry L. Stone, city attorney, for the appellant.

St. John Boyle and Humphrey, Barnett & Humphrey, for the appellee.

[6] WHITE, J. In these two cases the city of Louisville, by and through its city attorney, brought actions against the appellee, Louisville Railway Company, for taxes for the years 1893, 1894, 1895, 1896, 1897, and 1898, alleged to be due and unpaid. These taxes were alleged to be due on franchise, as assessed by the state board of valuation and assessment for the years 1893, 1894, 1895, 1896, and 1897, and upon assessments by the county assessor for 1894, 1895, 1897, and 1898. The amount of tax sought to be recovered is about $311,188. To

these actions appellee filed answers containing some fifteen paragraphs, in which there are specific denials of all allegations as to the assessment of the property and levy of the taxes, the denials being made in lack of knowledge or information sufficient to form a belief, although all these matters must be of record at the proper office. Other paragraphs presented matters of defense, pleading a contract with the appellant city to pay a license tax in lieu of all taxes; pleading the repeal of the statute authorizing the assessment by the state board of valuation and assessment of the franchise for the purpose of city taxation by the enactment of the charter of appellant; pleading that the valuation of the franchise as fixed by the board was too great and excessive, because a part of its track and plant extended beyond the limits of the city. These are among the defenses presented by the answer of appellee. A demurrer to several of these paragraphs was sustained by the court, and as to others overruled. While the two cases were pending an agreement of compromise was entered into by and between the appellee company and D. F. Murphy, city assessor, and J. B. Camp, tax receiver on behalf of the city, by which it was agreed that on payment of $177,093.48 in full compromise and satisfaction of all taxes, except on real estate, and in addition to license tax theretofore paid of $122,312.68, making a total sum of $299,406.16 for those years, the two suits for taxes would be dismissed, settled, at the cost of the defendant. This agreement was approved by the mayor, Charles P. Weaver, and subsequently by resolution of the general council of the city. This compromise agreement was made under a resolution of the general council approved January 11, 1896, as follows: "Be it resolved by the general council of the city of Louisville that the city attorney, the tax receiver, and the assessor are hereby appointed and constituted a board having power and authority to compromise any and all claims for back taxes by the city of Louisville against individuals, where said claims, in the opinion of said board, are in any wise doubtful, or where, in the opinion of said board, said compromise will redound to the substantial benefit of the city." In this compromise agreement the city attorney did not participate, and did not agree thereto. On the approval of the compromise agreement by the general council, the amount of $177,093.48 was paid by appellee, as stipulated. The resolution approving the compromise agreement provided: "Sec. 2. That the city attorney be instructed to dismiss all suits pending between the city of Louisville and

the Louisville Railway Company involving taxes claimed by the city against the said railway company." After these matters of compromise had been completed, the appellee filed an affidavit showing the compromise payment, and order to the city attorney to dismiss suits, and asked the court to order dismissal. The court took the matter of dismissal under advisement, pending which the city attorney took proof on the controverted facts. The court, after having considered the motion, ordered the two actions [8] dismissed, settled over the protest and objection of the city attorney. There was no trial on the merits—only the order of dismissal, from which these appeals are prosecuted.

Appellee has entered motions in this court to dismiss the appeals, the same reasons being given as are presented why the judgment and order of dismissal in the court below should be affirmed. It is contended by counsel for appellee that as appellant is a municipal corporation, and governed by the act of July 1, 1893, relating to cities of the first class, it has full power, by and through its general council, to manage the affairs of the city in such way and manner as they may deem best, and, while it is not contended that the general council could accept less than the sum due on a fixed liability, it may, on all doubtful or unliquidated matters, compromise with the party, and accept less than the full sum claimed, or may pay by way of compromise in excess of what they deem justly due. The contention of counsel, as we understand it, is that in all matters where the sum due the city is not finally fixed and certain, and where there is any controversy as to the right to collect or as to the sum due, the general council may agree with the party on any basis they deem proper, and finally adjust the matter, and thus bind the municipality the same as a natural person might bind himself by compromise agreement; that this power exists to compromise tax claims, by the city, as well as any other that might arise. On the other hand, the city attorney contends that, because of section 52 of the constitution, the compromise is ultra vires and void, as beyond the power of the general council. Upon this question the whole case depends, for, if the compromise agreement is binding on appellee, the [9] order of dismissal was proper, as there could have been no final recovery by appellant.

Section 52 of our constitution reads: "The general assembly shall have no power to release, extinguish or authorize the releasing or extinguishing, in whole or in part, of the indebted-

ness or liability of any corporation or individual to this commonwealth or to any county or municipality thereof." This provision was not contained in any previous constitution of this state, and this section has never been construed by this court, so far as we are advised. Similar constitutional provisions are found in the constitutions of the states of California, Colorado, Illinois, Louisiana, Montana, Missouri, Nebraska, Texas, and Wyoming, and possibly others that we have overlooked. The charter of appellant, at section 2742 of the Kentucky Statutes, sets forth the powers granted to it by the legislature. It reads: "That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the constitution and laws of the state, nor of the United States; with power to contract and be contracted with; to sue and be sued; to defend and be defended in all courts; to acquire property for municipal purposes or otherwise; to hold the same and all property and effects now belonging to them in their own names or in the names of others, to the use of the city for the purposes and intents for which the same were granted or dedicated; to use, manage, improve, sell and convey, rent or lease the said property, and have the like powers over property hereafter acquired; to have a common seal, and change it at pleasure, and act with or without [10] a seal." Section 2783 provides: "The general council shall have the power to pass, for the government of the city, any ordinance not in conflict with the constitution of the United States, the constitution of Kentucky and the statutes thereof." The question is presented, Is the compromise agreement and the resolution approving the same contrary to the state constitution (section 52, supra)?

In the state of Louisiana, where the constitutional provision is almost identical with ours, a case arose questioning the validity of a compromise made by the city of New Orleans with the Crescent City Railroad Company for municipal taxes, the action being by an individual taxpayer. The court said: "We pass to the question of the power of the municipal council to compromise with a delinquent taxpayer, and release him from payment of part or all of his taxes, while a suit for reduction of his assessment is pending before the courts. It is well settled that corporations have such powers as are given to them. There are special laws applying in matters of taxation. The consti-

tution specially prohibits the general assembly, and, it follows, subordinate municipal corporations, from releasing or extinguishing any tax indebtedness to the state, or due to any of its municipalities. It devolves upon us to determine in the case before us for decision whether the tax indebtedness here of the Crescent City Railway was within the scope of the prohibition. There had been a final assessment made. While the assessing authorities have the rolls in their possession in an incomplete state, they may reduce the assessment, but not after the assessment has passed from their hands. All taxpayers have the right to appear before the board of assessors of the parish of Orleans until the 20th of March, and in [11] other parishes until the first day of November, and should be heard regarding overvaluation of property, but not after those dates. The question of value of property assessed after the filing of the taxpayer's suit passes from the assessor and revising committees to the courts. The defendants urged that the assessment, as relates to those who appeal to the courts, is not complete; that, not being complete, a compromise may be made, as was made in the pending case. We have not found it possible to give our assent to that view. The suit brought does not have the effect of suspending the assessment. It is legal to the amount the court finds in the value of the property. Every person is taxed for the year, and the assessment dates from the day it was made, and not from the date of the final decision of the court pronouncing it legal as to value [for a part or the whole] as carried on the roll": City Item Co-operative Printing Co. v. City of New Orleans, 51 La. Ann. 713, 25 South. 313. Counsel for the city and the railway company in the case, supra did not contend that the city might legally compromise a tax claim after the amount was finally fixed by the assessing authorities, but that the right of compromise did exist until the final valuation was made by the courts, as it seems was a method of procedure allowed there, and that, as the question of value was undecided by the court, the compromise must be upheld. The supreme court, however, held that, after the assessment had been made by the proper authorities, the city could not compromise the tax claim; the final conclusion of the court being: "It follows that no compromise can be made on the basis of property being of less value when the municipality is concerned than when the state is concerned." The same court, in the case of City of New Orleans v. Sugar-Shed Co., 35 [12] La. Ann. 550, said: "It takes no argument or authority to establish that the

city had no power to exempt the property of the defendant, or to commute the taxes upon it, as is claimed was done."

In the state of Illinois, where the constitutional provision (article 5, section 23) is almost identical with that of our constitution (section 96), the supreme court, in the case of Board v. Smith, 95 Ill. 335, said: "Again, we are not aware of any power in the county board to make any abatement of taxes legally assessed, extended, and placed in due course of collection. If a party is aggrieved by an over-assessment, he should apply to the board of review to have it corrected, or to the July session of the board, under the ninety-seventh section of the revenue law. But when property has been assessed, and the tax extended, and the books placed in the hands of the collector, we are aware of no law authorizing the board to make any abatement. Or even after its session on the second Monday in July the general assembly has conferred no power on the board to abate state or other than county taxes, and we are not informed of any express authority for that body to abate county taxes. If the county board may abate state and other municipal taxes in one case, they may in all cases. If they may do so for one reason, they may for any reason or without reason, and thus defeat the collection of all revenue." The same court, in Mix v. People, 116 Ill. 273, 4 N. E. 786, said: "The law has designated a certain person to assess and fix a value upon property for purposes of taxation, and given a remedy to parties aggrieved by his action to have the same reviewed. If the parties neglect this opportunity, they at least cannot contest the matter in a suit like this, brought to enforce the lien given by the statute against the lands for [13] the nonpayment of the taxes. The action of the board of supervisors in appointing a committee to reassess these lands for the purposes of taxation, and their compromise with plaintiffs in error regarding the state and county taxes, was clearly unauthorized." The supreme court of Illinois recognizes the right and power of the city council to compromise ordinary claims due to or by the city. In the case of Agnew v. Brall, 124 Ill. 314, 16 N. E. 231, the court said: "They [city council] have no power to squander or give away the funds or property of the incorporation, but all property within their control belonging to the incorporation must be honestly applied to the uses and purposes specified in the act of incorporation. The city council have no power to sell or in any manner dispose of the property of the corporation without consideration, and, in our opinion, they have no right to

discharge a debt without payment which may be held against parties who are solvent and responsible, where no controversy exists in regard to the validity and binding effect of the indebtedness. But a municipal corporation has power to settle disputed claims against it: Dillon on Municipal Corporations, sec. 398. It may prosecute suits in favor of the corporation, and defend actions brought against it. It may sue and be sued, and the right to settle matters in litigation follows logically from the right to maintain or defend actions. This doctrine is well stated in President etc. v. Mappin, 14 Ill. 195, 56 Am. Dec. 501, where it is said the power to prosecute suits in behalf of the corporation includes the power to settle same. So the power to defend suits brought against the corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant." The court there says that the power to [14] compromise suits had long been recognized in that state, yet in tax cases had held a compromise unauthorized and void.

Section 4 of article 9 of the constitution of Nebraska is very similar to section 52 of our constitution. In the case of State v. Graham, 17 Neb. 43, 22 N. W. 114, the supreme court of that state, after quoting section 4, said: "Revenue is to be provided by levying a tax by valuation, so that every person and corporation shall pay tax in proportion to his, her, or its property and franchises; and the legislature shall have no power to release any county, city, etc., or the inhabitants thereof, from their proportionate share, nor shall commutation be authorized in any form. Stronger language could scarcely be used. In effect, the constitution guarantees to every property owner in the state that his property shall be liable for the just proportion of taxes due thereon according to the valuation as ascertained by law, and for no more. It deprives the legislature of the power to add to this amount, or to discriminate between taxpayers in any manner or form. Now, what the legislature cannot do directly it cannot do indirectly. If it cannot say to A, 'You must pay the entire taxes levied upon your property,' and to B, 'You need pay but fifty per cent of the amount thus levied,' it cannot accomplish by indirection what it is prohibited expressly from doing." The force and effect of the constitutional provision again came before the court in the case of Lancaster Co. v. Trimble, 33 Neb. 125, 49 N. W. 939. The court said: "The legislature is without power to release any inhabitant or corporation

from his or its proportionate share of taxes, nor can it confer such authority upon county commissioners. It has authorized them to purchase real estate at tax sale, but [15] has provided for the foreclosure of tax certificates in their hands only when the amount due thereon exceeds a specified sum. The proviso clause of the section of the statute quoted expressly prohibits county commissioners from foreclosing tax liens when the amount of the lien is $200 or less. It, in effect, places it in the power of county commissioners to release the taxes upon lots and lands where the amount of the delinquent taxes thereon is not over $200. All they would have to do to accomplish it is to purchase that kind of property for the county at tax sale. The legislature is powerless to confer such authority. It cannot do indirectly what the constitution prohibits it from doing directly. That is clear: Wood v. Helmer, 10 Neb. 68, 4 N. W. 968."

The supreme court of Missouri, in State v. Hannibal etc. R. R. Co., 75 Mo. 210, held that a municipal corporation had no power to grant exemption from or commutation of taxes, and a contract undertaking to do so was void. In City of Kansas City v. Hannibal etc. R. R. Co., 81 Mo. 290, the court said: "Nor did the court err in the exclusion of the evidence of a compromise effected by the defendant with the county court by which a less sum than that demanded by the city was accepted in full of that demanded. The county court had no authority to compromise the city taxes. . . . . The city council of Kansas City is forbidden to compromise city taxes, by the charter of the city, and therefore could not ratify a compromise made by the county court."

Section 55, article 3, of the constitution of Texas is to the same effect as section 52 of our constitution. An action was begun by the city of Houston in January, 1899, for taxes due for the years 1892 and 1893 from certain persons. In May, 1899, an amendment to the [16] charter of Houston became effective which provided that suits for taxes should be barred by limitation of four years, and that such plea might be interposed to actions already instituted. The question of the validity of this act as to the actions begun in January prior to its enactment was before the court of civil appeals in Ollivier v. City of Houston, 22 Tex. Civ. App. 55, 54 S. W. 940, and its opinion was approved by the supreme court, in 93 Tex. 201, 54 S. W. 943. The court of civil appeals said: "The inevitable effect of the law under consideration is to extinguish the liability of

appellant for the taxes alleged to be due by them, and this, as to pending suits for taxes coming within its provisions, was its manifest purpose. By that provision of the constitution (section 55, article 3) the legislature is forbidden to pass any law which would 'extinguish any liability, indebtedness or obligation to the state or any county or city,' and thereby power to extinguish liability for taxes was denied. The constitution of itself furnishes many evidences of the earnest purpose of the framers to render impossible every form of governmental favoritism. The granting of special privileges, the bestowal of favors, the lightening of the public burdens as to one citizen at the expense of others, are contrary both to its spirit and its letter. So it is declared that taxation shall be equal and uniform. But the force of this provision would be defeated if the power remained to relinquish at will the liability thus justly and fairly fixed. For the prevention of these evils this provision was inserted. Its terms are broad enough to cover every conceivable obligation or liability, the remission of which would diminish the public revenue, and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption. . . . . For these reasons, [17] the contention of appellant that the power rests in the legislature to extinguish the liability of a citizen of a municipal corporation for taxes levied and assessed in a case where the vast majority of his fellow-citizens have paid their part of the taxes thus levied, seems inconsistent with the spirit of our institutions, and utterly untenable from any point of view. But it is urged that the law in question, while it may operate to extinguish the liability of the citizen, is, after all, but a law fixing the limitation of actions, and that its incidental effect upon such cases as the one before us does not affect its validity. That a power cannot be exercised incidentally or by indirection which could not be directly exercised is elementary. The effect of the act is to relinquish liability. The purpose to accomplish that end is manifest. The ordinary effect of changes in the law of limitation is not to extinguish any right or liability, but to limit the time within which it may be enforced. The right may be lost or the liability extinguished by delay or negligence, but such result is not chargeable to the law. So, in this instance, if the city were required to sue hereafter within a prescribed time, the validity of the act would be beyond question. But, as the matter is presented, the city had already undertaken, within a time permitted by the then existing law, to enforce the collection of these taxes. The liability was ex-

istent, and the rights thereunder unimpaired, when the act took effect. No opportunity was given to the city to proceed with its remedy. The result was the effectual exemption of the property of appellants from taxation for the years named. . . . . The act has been discussed from the standpoint of its effect upon this class of cases alone, and, in so far as it would have [18] the effect of defeating actions pending at the time it became effective, it is held to be unconstitutional."

In the state of Nevada the question arose as to the power of county commissioners to compromise taxes, a suit for which was pending. The county commissioners of that state had power very similar to our fiscal court. In deciding this question the supreme court in the case of State v. Central Pac. R. R. Co., 9 Nev. 79, at page 88, said: "Did the board of county commissioners have any authority to make the compromise with defendant? It is not claimed that there is any law expressly giving to the commissioners power to compromise and settle suits instituted by the state for the collection of delinquent taxes. But it is argued by defendant's counsel that section 8, subdivision 12, of the statutes of 1864-65 (page 259), giving to the commissioners power 'to control the prosecution or defense of all suits to which the county is a party,' and section 29 of the statutes of 1871 (page 94), providing that 'no suit for the collection of delinquent taxes shall be commenced except by the direction of said board,' imply that it was the intention of the legislature to invest the commissioners with full power to control the collection of taxes, and 'that, when the process of collection has taken the form . . . . of an action at law, the county commissioners have control of such action.' This position is wholly untenable. The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void." This position was reaffirmed in a case of the same title: State v. Central Pac. R. R. Co., 10 Nev. 48, 84.

[19] In Massachusetts, where the county commissioners were permitted to abate taxes upon proper showing, they were denied the right to allow interest on the taxes refunded in the case of City of Lowell v. Middlesex County Commrs., 3 Allen, 550. To the same effect are the cases of Wilson v. Supervisors, 47 Cal. 91; City of Dubuque v. Illinois Cent. R. R. Co., 39 Iowa, 56.

We think it clear from these authorities, under constitutional provisions like our own, even if the provision of section 52 were not plain, that there is no authority given, or could be given, to the general council of appellant to release in whole or part the taxes due from any individual or corporation. If the general council could compromise at less than the amount due, at the fixed rate and assessed value, the liability of any person or corporation, even after suit had been instituted, it could then by indirection do what the constitution forbids; that is, release a part of a liability. If it was desired by the general council to release taxes, the officers would delay and return delinquent, and suit would be brought and compromise effected at the reduced amount. To prohibit the possibility of such a procedure, the section of the constitution was enacted. The further provision for uniformity of taxation on all property is a further safeguard against discrimination in taxation or a reduction or release of part of the taxes. We do not mean to hold that an unlimited demand by or against the city cannot be compromised, but we think that, when the liability to the city is fixed, it cannot be relinquished in whole or in part. When the property has been regularly assessed, and the assessment passes from the officer making it, and the claim comes into the hands of the collecting officer, we are clearly of opinion that the liability is fixed, [20] so that less cannot be accepted in satisfaction thereof. When the actions for these taxes were brought, more than a year had elapsed after the assessment became final, and all statutory right to question the amount of the assessed valuation had long since passed. Moreover, the tax bills were prima facie correct as to amount, and appellee's liability therefor was fixed, so far as legal procedure before the board of assessment, valuation, and equalization was concerned. The compromise agreement was beyond the power of the general council, and was ultra vires and void.

There is yet another reason why the general council could not make the compromise agreement. By section 2909 of the Kentucky Statutes, it is provided: "There shall be elected by the general council immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all the officers and boards of the city in the discharge of their official duties. If requested, he shall give his own opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against

the city, and to attend to such other legal business as may be prescribed by the general council. His salary and term shall be fixed by the general council, not to exceed four years." By section 3005 of the Kentucky Statutes, it is provided: "On the first day of May of the second year after the assessment of city taxes the receiver shall make out a list of the bills still wholly or partly unpaid, on lands or improvements, and furnish the list to the city attorney, whose duty it shall be to bring, without delay, suits for the recovery thereof in the circuit court," etc. This section of the charter of appellant places in the hands [21] of the city attorney for suit the unpaid tax bills at a certain date, and directs suit to be instituted thereon by the city attorney. This places the duty of collecting delinquent taxes, after a certain time, in the hands of an officer provided by the charter, and also especially provides his duty in the premises. After the matter comes to the city attorney as provided by the charter, the general council cannot control the matter, and cannot direct or order the dismissal of suits begun by the city attorney under the mandate of the charter. If it be made to appear to the court wherein the action is pending that the delinquent has paid the taxes due, of course a satisfaction would be entered and the action dismissed, settled. But, as we have said, the general council cannot accept less than is due, and has no power or authority to compromise for any sum less than the liability fixed by the assessed value at the rate of tax for that year. Likewise, we are of opinion that the city attorney could not effect a compromise and take less than is shown to be due from the taxpayer, neither before nor after suit brought: City of Louisville v. Bank of Kentucky, 174 U. S. 412, 19 Sup. Ct. Rep. 881. His powers and duties are fixed by the charter provision, and when the delinquent taxes come to him for collection the matter must be adjusted by a judgment, unless the full amount be paid.

The merits of the case as presented by the pleadings are not before us, as there has been no trial in the lower court.

Having reached this conclusion, it is unnecessary to decide whether the city should refund to appellee the amount paid on the compromise, or to pass on any question raised by the pleadings, as the same are not before us. Wherefore [22] the motion to dismiss the appeal is overruled, and the judgment of the dismissal by the court below is reversed, and the cause remanded,

with directions to set aside the order of dismissal, and for further proceedings consistent herewith.

Whole court sitting.

Judge DuRelle dissents.

Petition for rehearing by appellee overruled.

A City or Town has no Power, by contract or otherwise, to exempt property from taxation: Tampa v. Kaunitz, 39 Fla. 683, 63 Am. St. Rep. 202, 23 South. 416; Springfield v. Smith, 138 Mo. 645, 60 Am. St. Rep. 569, 40 S. W. 757; Whiting v. West Point, 88 Va. 905, 29 Am. St. Rep. 750, 14 S. E. 698.

HOLT v. THURMAN.

[111 Ky. 84, 63 S. W. 280.]

OFFICER'S SALARY—Assignment of.—The future salaries of public officers are not assignable, on the ground of public policy, and an attempted assignment thereof is void. (p. 401.)

EXECUTIONS—Officer's Salary.—A Creditor cannot Subject to the payment of his debts the salary of a public officer which is to become due for services to be rendered in the future. (p. 405.)

Charles P. Johnson and Pryor & Sapinsky, for the appellant.

J. B. McCormick and Bullitt & Shield, for the appellee.

85 BURNAM, J. At the date of the institution of this suit in the Jefferson circuit court, on the 26th of July, 1897, W. T. Thurman was the duly elected, qualified, and acting prosecuting attorney of the Louisville city court, and was by law entitled to be paid a salary for his services by the city of Louisville of three thousand five hundred dollars in monthly installments of two hundred and ninety-four dollars and sixty-six cents, on the last day of each month of his term. The appellant, J. T. Holt, had recovered a judgment against him, upon which execution had issued, and been returned by the proper officer "No property found." Thereupon this action was instituted pursuant to section 439 of the Civil Code to subject the salary due to Thurman as prosecuting attorney by the city of Louisville to the payment of his judgment. Writs of garnishment were issued at different times, which were served upon the treasurer of the city, which seem to have been abandoned. Finally, on the 23d of November, 1897, an alias attachment was issued, which was duly served upon the treasurer. The city of Louisville, for

answer to the garnishment, said that on the 18th of November, 1897, before the suing out of the last attachment, there was filed with the auditor of the city a writing, dated November 3, 1897, purporting to be an assignment by [86] William T. Thurman of his salary due from the city for the month of November, 1897, to one W. S. Miller; and that, furthermore, no part of the salary of the defendant Thurman for the month of November, 1897, was due at the date of the service of the garnishment upon the city, and asked that the order of attachment be discharged. Subsequently, on the 6th of January, 1898, another alias attachment was sued out, which was duly served upon the treasurer of the city, seeking to garnishee the salary of Thurman for the months of November and December, 1897. Thereupon appellees H. Wedekind & Co. filed their petition to be made parties to the proceeding, setting up a written assignment dated November 3, 1897, by which Thurman assigned to W. S. Miller, Jr., his salary of two hundred and ninety-one dollars and sixty-six cents due and to become due for the month of November, 1897, as prosecuting attorney of the police court, and which was on the same day assigned in writing to them by Miller; and alleged that the assignment to them was prior in date to the attachment; and asked that the city of Louisville be required to pay Thurman's salary for November to them. And the appellees, L. Simons & Co. filed their petition to be made parties, in which they allege that on the sixth day of December, 1897, Thurman, for a valuable consideration, had assigned and transferred to them in writing his salary earned and to be earned as prosecuting attorney of the police court for the month of December, 1897. The city of Louisville was required by rule to pay into court the amount due Thurman for salary as prosecuting attorney for the months of November and December, 1897. The appellant, Holt, interposed a general demurrer to each of the petitions of Wedekind & Co. and Simons & Co., which were overruled, and judgment entered for claimants, [87] and to review that judgment this appeal is prosecuted.

The claims of both appellant and appellees are bona fide, and there is no dispute as to the facts, and the record therefore only presents two questions of law to be decided by this court: 1. Is the assignment of his salary by a public officer, before it becomes due, contrary to public policy, and void? 2. Can the salary of a public officer, before it becomes due and payable, be reached by attachment, and subject to the claim of a creditor

of such officer? This question was considered by this court in the case of Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464. The controversy was over the wages of a policeman in the city of Louisville. He had, about the first of the month, sold and assigned his claim against the city for wages of that month, and after the assignment a creditor sought to subject it by attachment. It was held that, as the policeman had an existing contract with the city for the payment of such a salary, and his term of office extended beyond the time when it could be presumed because of the existence of the contract that the salary would be earned, and had such a potential existence that he had a right to transfer it, and, having done so for value, it vested the assignee with an equity which, being older in time than that of the attachment, must prevail. The opinion does not discuss or decide the question from the standpoint of public policy, and the authorities cited to support it do not in any way consider or involve this question. There is no suggestion in the opinion of any distinction whatever between the unearned wages of a person occupying a mere private position and one who is discharging the duties of a public officer. In the first case, the law is well settled that there may be an assignment of wages [88] or salary to be earned under an existing employment, made in good faith, and for a valuable consideration, and that a court of equity will compel the specific performance of such a contract in certain cases, there being no question of public policy involved in such a transfer; and to this class of cases the authorities referred to in Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464, have a direct application, and they are supported by many authorities: See 2 Am. & Eng. Ency. of Law, 2d ed., 31; Perkins v. Butler County, 44 Neb. 110, 2 Am. & Eng. Dec. Eq. 218, 62 N. W. 308, where there is a very full collation of the authorities on this subject. But the law is equally well settled that the future salaries of public officers are not assignable on the ground of public policy, and an attempted assignment thereof is void. "The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for their payment; and the assignment of such funds before they are due impairs the efficiency of the public service, and is void, both in law and equity, as being

against public policy": See 2 Am. & Eng. Ency. of Law, 2d ed., 1033, and cases there cited. This question has been repeatedly considered by the English and most of the American state courts, and they have been well-nigh unanimous in holding against the validity of such assignments on the ground of public policy. We quote a few of them here. Greenhood on Public Policy, rule 293, page 349, says: "Any contract which secures to anyone not occupying a public office its benefits or emoluments, or any part thereof, is void." Greenhood on Public Policy, rule 297, page 351: "The salary or emoluments of a public officer, except when they are already [89] earned, ... are all incapable of assignment." Mechem on Public Officers, section 874: "Assignment of unearned compensation opposed to public policy. . . . . While the compensation already earned by a public officer may validly be assigned by him, it is settled by clear preponderance of authority that an assignment of future compensation, not yet earned, whether payable by salary or fees, is opposed to public policy, and void. 'Salaries,' it is said in one case, 'are by law payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries.' It is true that in respect to officer removable at will this evil could, in some measure, be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles, be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service." And to the same effect are Clark on Contracts, chapter 8, page 419, and Lawson on Contracts, section 355, page 379. Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273 (syllabus): "An assignment by a public officer of the future salary of his office is contrary to public policy, and is void." Statement of the case: "The [90] complaint in each case alleged and the evidence established the fact that the defendant was a clerk

of the United States treasury department in New York City, and that he sold and assigned to plaintiff a month's salary in advance at a discount of ten per cent; that the defendant, when the salary became due, collected the same, and converted it to his own use." Opinion: "The controlling question in these cases is that of the lawfulness of an assignment by way of anticipation of the salary to become due to a public officer. The particular cases presented are of assignments of a month's salary in advance. But, if this can be sustained in law, then such assignments may cover the whole period of possible service. In the particular cases before us, the claims to a month's salary seem to have been sold at a discount of about ten per cent. While this presents no question of usury (since it was a sale, and not a loan, for which the parties were dealing), it does present a quite glaring instance and example of the consequences likely to follow the establishment of the validity of such transfers, and thus illustrates one, at least, of the grounds on which the alleged rule of public policy rests, by which such transfers are forbidden. The public service is protected by protecting those engaged in performing public duties, and this not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment. It is argued that a public officer may better submit to a loss in order to get his pay into his hands in advance than deal on credit for his necessary expenses. This may be true, in fact, in individual instances, and yet may, in general, not be in accordance [91] with the fact. The substance of all is the necessity of maintaining the efficiency of the public service by seeing to it that the public salaries really go to those who perform the public service. To this extent, we think, the public policy of every country must go to secure the end in view." It would not be profitable for us to quote numerous other decisions sustaining the conclusion of the New York court, but we will cite a few of them: See State v. Williamson, 118 Mo. 146, 40 Am. St. Rep. 358, 23 S. W. 1054; Schloss v. Hewlett, 81 Ala. 268, 1 South. 263; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Beal v. McVicker, 8 Mo. App. 202; Stone v. Lidderdale, 2 Anstr. 233; Davis v. Duke of Marlborough, 1 Swanst. 74; Flarty v. Odlum, 3 Term Rep. 681; Lidderdale v. Montrose, 4 Term Rep. 248; Barwick v. Reade, 1 H. Black. 627; Arbuckle v. Cowtan, 3 Bos. & P. 328; McCarthy v. Goold,

1 Ball. & B. 389; Emerson v. Hall, 13 Pet. 409; King v. Hawkins, 2 Ariz. 358, 16 Pac. 434; Field v. Chipley, 79 Ky. 260, 42 Am. Rep. 215; Billings v. O'Brien, 14 Abb. Pr., N. S., 238, 246; National Bank v. Fink, 86 Tex. 303, 40 Am. St. Rep. 833, 24 S. W. 256; Williams v. Ford (Tex. Civ. App.), 27 S. W. 723; Stevenson v. Kyle, 42 W. Va. 229, 57 Am. St. Rep. 854, 24 S. E. 886. In these various decisions, it has been held that the pay of an army officer, the salary of a clerk in the federal treasury, of a United States inspector of customs, of a county assessor, of a mail carrier, of a clerk of the police court, of the fees of a master of chancery, of a clerk of a court of chancery, of a sheriff, and of many other officers, cannot be assigned in advance. So great were the wrongs arising from the assignment of claims against the United States government that a statute was passed in 1853, and re-enacted in section 3477 of the Revised Statutes of the United States, prohibiting the assignment of any claim or any interest in any claim until after it had been allowed, and a warrant [22] for its payment issued. In this state this question was very fully considered in the case of Field v. Chipley, 79 Ky. 260, 42 Am. Rep. 215. It was there held to be against public policy for the clerk of the Louisville chancery court to assign the fees and emoluments of his office to be earned in the future. Public policy is defined by Mr. Wharton to be "the principles under which the freedom of contract and private dealing is restricted by law for the good of the community. Thus, certain classes of acts are said to be 'against public policy,' and the law refuses to enforce or recognize them on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality." The regular receipt by public officers of the salary provided by law for their compensation strongly tends to secure the faithful discharge of their duty. If the prosecuting attorney of the city court can assign unearned salary for one month, no valid reason can be suggested why he could not assign it for one year, or, indeed, for the entire term for which he was elected. If a part is assignable by way of anticipation, there can be no limit, and thus one of the strongest incentives to the faithful performance of official duty is removed. For these reasons we hold the assignment by the appellee, Thurman, of his unearned salary for the months of November and December, to H. Wedekind & Co. and L. Simons & Co., contrary to public policy, and absolutely void, and the case of Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464, is over-

ruled. By a parity of reason it follows that a creditor cannot subject the salary of a public officer, which is to become due for services to be rendered in the future, as such a course would result in expelling the debtor from the public service, and would be detrimental to the public weal. But it has been held by this court, in a number of cases, that, as a city is a corporation, 93 a creditor may subject money actually due and owing from the city to the officer for services which have been fully rendered at the date of the service to the attachment: See Speed v. Brown, 49 Ky. 111. It therefore follows that, as no salary was due to the appellee on the 23d of November, the date of the service of the first alias attachment, nothing was reached by this attachment; but, at the time the alias attachment was served upon the city on the sixth day of January, there was due and owing to appellant by the city for services actually performed his salary for two months, and appellant was entitled to have same subjected to the payment of the debt sued for. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

The Assignment of the Salary of a public officer to be earned in the future is void: Dickinson v. Johnson, 110 Ky. 236, 96 Am. St. Rep. 434, 61 S. W. 267; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 19 Am. St. Rep. 507, 25 N. E. 855; Schwenk v. Wycoff, 46 N. J. Eq. 560, 19 Am. St. Rep. 438, 20 Atl. 259; but see Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; McGregor v. McGregor, 130 Mich. 505, 97 Am. St. Rep. 492, 90 N. W. 284. On subjecting the salaries of officers to the payment of their debts, generally, see the monographic note to Dickinson v. Johnson, 96 Am. St. Rep. 443-452.

TYLER v. MOODY.

[111 Ky. 191, 63 S. W. 433.]

SALE—Breach of Warranty—Scienter Need not be Alleged.—When there is an express warranty of any particular thing, or a machine for a particular purpose, or against particular damages, it is not necessary, in an action for a breach thereof, to allege a knowledge of the falsity of the representation when made. (p. 408.)

SALE—Breach of Warranty.—The Damages Recoverable for a breach of warranty include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. (p. 409.)

SALE OF GAS MACHINE—Breach of Warranty—Damages.—If a gas machine is sold under a warranty against its exploding, the buyer's recovery, in case of an explosion, may include damages for his personal injuries. (p. 410.)

Simrall & Doolan, P. J. Beard and Willis & Willis, for the appellant.

W. S. Pryor, B. J. & Upton W. Muir, J. C. Beckham & Son and Pryor, O'Neal & Pryor, for the appellee.

193 WHITE, J. The appellant brought this action to recover for damages for personal injuries caused by an explosion of gas generator for the manufacture of acetylene gas, sold by appellees, Hall & Son, and manufactured by appellees, Moody & Offutt. Appellant avers in his petition that appellees "guaranteed and represented to him at the time of said sale, and as a part of said contract, that the said machine, and the use thereof in generating acetylene gas, was and would be entirely safe, and that no damages or injury would or could result therefrom; and that said machine was and would be perfectly automatic in its action, and could only make gas equal to the consumption; and that same was so constructed as to be absolutely safe in its use, and that same could not generate gas beyond the capacity of the machine; and that same could always be depended upon to do the work claimed for it; and that same was so simple in construction that there was absolutely nothing about it to get out of order; and that the same was simple and safe, and that same could not generate gas in sufficient quantity to blow up or explode same; and this plaintiff relied upon said representations and statements as true. . . . . But he says that said 194 representations were false and untrue," and it is then set out that each representation was un-

true, and that appellant was properly attending to the machine, and without fault on the part of appellant the generator did explode and blow up, by which he was seriously and permanently injured. Appellees answered, denying the representations alleged that they claimed or represented the machine as absolutely perfect, or that no danger or injury could possibly happen in its use; and denied any representation that the machine could not generate gas in sufficient quantity to blow up or explode, though it is true, if kept in good order, and used with care, it cannot generate gas sufficient to cause an explosion. However, it was admitted that they represented that the machine was safe, and they aver that with proper and careful use it was safe. Appellees Moody and Offutt also denied that appellees Hall & Son were their agents in making the sale and representations, such as were made, and they pleaded that the injury was caused by the negligence of appellant himself. These answers were filed without a demurrer to the petition.

On trial the appellant introduced evidence tending to prove every allegation of his petition. He testified to representations and warranties by Hall & Son to him, before and at the time of the contract of sale, that the machine was perfectly safe, and would not and could not explode except by contact with fire; that appellant had no knowledge or information as to the machine, or the manufacture of acetylene gas, except as given him by Hall & Son, and also from a circular issued by Moody & Offutt, who were the manufacturers of the machine; that appellant relied on these statements and representations as true, and was thereby induced to buy, and he did buy, the machine, 195 which appellees Hall & Son placed in his house, and put in operation; that in the use of the machine as directed, and while exercising due care and caution, and without fault on appellant's part, the machine exploded, causing appellant's injury. The extent of the injury was shown, which was considerable. The circular furnished by the manufacturers, Moody & Offut, was introduced. At the conclusion of appellant's evidence the court directed a verdict for appellees, and, judgment being accordingly rendered, this appeal is prosecuted.

In the judgment rendered the court required appellees to pay the costs from the time of filing their answers, including the trial, the court being of opinion that the petition was insufficient. Counsel for appellees rely on the case of Jones v. Ross, 98 Ala. 448, 13 South. 319, and cases cited, to sustain the judgment of the court below. In that case Ross sued Jones

to recover damages for breach of warranty in the sale of a horse. The petition alleged that "defendant sold to plaintiff a horse, which defendant falsely represented to be gentle, and to work kind and gentle anywhere." The horse, being hitched to a buggy, ran away, whereby plaintiff was injured, for which recovery was sought. The petition further avers "that the defendant knew said horse was vicious and unsafe, and intentionally represented him to plaintiff to be safe and gentle." The supreme court of Alabama held the petition to be sufficient to enable Ross to recover for his injuries, but on the proof the court held that the case was not made out, and a peremptory instruction should have been given. The court on that point said: "There is not one particle of evidence in the record tending to show that defendant knew, or had reason to believe, the horse to be vicious and unsafe, or that the affirmation was of [196] that reckless character to be the equivalent of bad faith; and without proof of some fact or circumstance tending to sustain these averments plaintiff was not entitled to recover for personal injuries in this action." In that opinion the court refers to the case of Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4, as decisive of the question as to what averments were necessary to recover. The averments in the petition of the case at bar are that appellees expressly warranted that the machine would not and could not explode. It is not alleged that appellees knew this to be false, but it is alleged that it was false, for the machine did explode and blow up. Counsel for appellees insist that there is not an averment of scienter in the petition, and it is therefore insufficient. In Chitty on Pleading, 137, the author says that case or assumpsit may be supported for a false warranty on the sale of the goods, and that "in an action upon the case in tort for a breach of warranty of goods the scienter need not be laid in the declaration, nor, if charged, could it be proved."

In the case of Shippin v. Bowen, 122 U. S. 576, 7 Sup. Ct. Rep. 1283, the supreme court held that this rule of pleading, as stated by Chitty, applied where the action was for breach of an express warranty, and the scienter need not be alleged; for, if the warranty was expressly made, it made no difference whether the warrantor knew it was false, or did not know whether it was true or false. This case, and the authorities cited, are decisive of the question that it is not necessary to allege a knowledge of the falsity of the representation when made, where there is an express warranty of any particular

thing, or of a machine for a particular purpose, or against particular damages.

[197] It is argued that in no state of case can a recovery be had for the injuries to appellant, because they are too remote. A leading case upon the criterion of recovery for breach of warranty is Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696. The supreme court there said: "The damages recoverable for a breach of warranty or for false representation include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act."

In Sutherland on Damages, second edition, page 1523, section 675, it is said, after a review of many cases: "A buyer may recover damages for personal injuries which result from selling property with a false warranty. . . . . A dealer will be liable for like injuries from the explosion of illuminating oils sold with warranty, express or implied, which is untrue. And so will any vendor be held answerable for such injuries from vicious animals sold with warranty of gentle and docile nature. In such cases there is a negligence, which, though free from fraud, involves a serious breach of social duty as well as contract; and, where the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be coextensive with that allowed for compensation in actions for negligence. Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to the one injured thereby, whether a contract between them be violated by that negligence or not. If the law and a contract impose the same duty, the same redress for violation is due by either, and would be accorded unless there should be practical restriction in the form of action resorted to to obtain that redress." The doctrine of liability for all damage which, in the contemplation of [198] the parties, or according to the natural or usual course of things, may result from a breach of the warranty, is now well recognized, and is recognized by Jones v. Ross, 98 Ala. 448, 13 South. 319, where the court held the petition sufficient. The exact criterion of recovery in this case, even if appellant should be entitled, on the proof, to recover at all, was not passed on by the court below, unless the court intended by his direction of verdict to hold that damages for personal injury could not be recovered, and that there was no claim of difference in value of the machine, and no recovery sought therefor. If this was the

conclusion of the lower court, we are of opinion it was error. The warranty, as alleged and proved by appellant's evidence, was against explosion—the very thing shown to have happened. Upon this showing by appellant, uncontradicted, we think he would be entitled to recover for his personal injury, as this evidently was in contemplation of the parties, or, according to the natural or usual course of things, might result from a breach of the warranty that the machine would not explode. An explosion of a machine of this sort would usually and ordinarily be attended with damage other than to the machine itself, and might injure persons—being near a dwelling, would probably do so—and so it must be held that personal injury was contemplated as a probable result of an explosion, and that was what appellant was assured would not happen. We conclude, therefore, that upon the case as presented by appellant a peremptory instruction should not have been given. Without contradictory evidence, he was entitled to recover.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial, and for further proceedings consistent herewith.

Whole court sitting.

That the Vendor or manufacturer of a machine to be used for a particular purpose may be answerable for personal injuries suffered by reason of an explosion thereof, see Boston Woven Hose etc. Co. v. Kendall, 178 Mass. 232, 86 Am. St. Rep. 478, 59 N. E. 657. In Swayne v. Waldo, 73 Iowa, 749, 5 Am. St. Rep. 712, 33 N. W. 78, it is held that if an article is warranted to be of a certain character, and this is shown to be false, the party injured may recover damages for breach of warranty without showing that the party making the warranty knew it to be false. But see Cunningham v. Smith, 10 Gratt. 255, 60 Am. Dec. 333.

STAPLETON v. POYNTER.

[111 Ky. 264, 62 S. W. 730.]

CUSTODY OF INFANT—Welfare of the Child.—It is only in cases where a parent asks a court to change the custody of his child, basing his claim upon a legal right, that the court will look to the welfare of the child in withholding its aid, basing its action upon the principle that equity will not do a wrong to aid a mere naked legal right. (p. 413.)

CUSTODY OF INFANT—Welfare of the Child.—A Widow of moral habits, good health, and enough industry reasonably to insure her child from want and distress, is entitled to his custody as against his grandparents, although they possess fortune, character, kindness, and affection for the child, and he desires to remain with them. (p. 414.)

CUSTODY OF INFANT.—The Wishes or Judgment of a Child of sufficient maturity to realize in a measure his situation cannot, independent of or despite other circumstances, control in the determination of his custody. (p. 415.)

CUSTODY OF INFANT, Mother's Contract Relinquishing.—A contract made by a woman under the disability of coverture, and indorsed by her husband, giving their child to its grandparents, is not binding upon her, and upon her husband's death she may recover the custody of the child. (p. 415.)

H. C. Hazlewood, James Sparks, E. H. Johnson and J. A. Wilson, for the appellants.

Charles R. Brock, A. W. Alcorn and D. K. Rawlings, for the appellee.

264 O'REAR, J. This action was instituted by appellee, the mother of John Craig Stapleton, to recover his possession of appellants, his paternal grandfather and grandmother, the lad being then about nine years of age. Appellee is a widow. The father of the boy had died some years previous, leaving no estate, and the widowed mother had none. Appellee, 265 who assumes her maiden name, and W. R. Stapleton were married in 1888, and after a brief and unhappy union, of three or four years, a separation ensued, being, as the record discloses, an abandonment of appellee by her husband, who had become dissolute, and who finally lost his life in a drunken brawl. In this distressing situation, appellee went with her two children, John Craig, and a girl some two years younger, to the home of appellants. This was before the death of appellee's husband. She continued there some months, when it was suggested that the old folks could not well accommodate her longer; but they insisted on keeping the children, to whom they ap-

pear much attached, especially the boy. Appellee then sought and obtained employment as a domestic, but, desiring the presence of her children, above other considerations, left the place, and took them with her to her father's, in an adjacent county. Appellant, Edward Stapleton, and the father of the boy, went to her father some two months afterward, and, under promises of reform, a reunion of the unfortunate couple was agreed upon, the father and grandfather of the boy taking him back to Laurel county, and the wife and the little girl to follow in a few days. She did so. But she says that then her husband declined to live with her, and declared his only purpose was to regain possession of the boy. Appellee returned to her father's, but soon after again sought employment, and obtained a situation in a family at Somerset, where her girl had better advantages for attending school.

When appellee was first abandoned, and was face to face with the proposition of earning her own living, she was induced to sign a contract with appellants concerning her children. This contract is as follows:

"An article of agreement between Christina Stapleton, of 266 the first part, and Ed. Stapleton and Elizabeth Stapleton, his wife, of the second part: The party of the first part agrees to give her two children, Craig and Della, to the party of the second part, to keep and control as their own until they become twenty-one years old, unless the party of the first part and her husband should live together again. Then she is to have her children, and not till then. She also gives to the party of the second part all her household goods, and horse and cow, to be used to the benefit of raising said children, and also what W. R. Stapleton, her husband, left in the house of Mr. Gee, which she was to have in provisions to live on; and the party of the second part agrees to try to give said children a common education. This April 30, 1893.

"CHRISTINA STAPLETON.
"ED. STAPLETON.
"ELIZABETH STAPLETON.

"Attest: ELLEN STAPLETON.

"I do agree to the above contract.

"W. R. STAPLETON."

Her husband, some time after, by his indorsement, approved it.

After the death of her husband, the boy now having grown in size, years, and usefulness, and therefore helpfulness, she

seeks to recover possession of him, and, indeed, has sought at frequent intervals before this suit to do so, but unsuccessfully until now.

The defense is summed up by counsel for appellants, in their brief, as follows: "1. The appellants, the grandparents of the child, John Craig Stapleton, are the proper persons to have the care, custody and control of said child, and appellee is not; 2. That they (appellants) are financially able to care for and educate said child in a manner suited to his station in life, and that appellee is not; 3. That said child is possessed of sufficient intelligence and age to judge for himself where he should live, and that it is [267] the desire of said child to remain with its grandparents, and not with its mother; 4. That on the thirtieth day of April, 1893, when this child was a mere infant, appellee, by a writing, surrendered the custody of this child to appellants; and afterward her husband, its father, agreed to the same contract, and signed it; 5. That since said time appellants have had the care, custody, and control of said child, and that during all of said time, up to now, they have cared for and treated said child in a manner highly conducive to its best interests; 6. That it must be a great hardship to appellants and the child, considering the contract and promises made concerning the child, and the attachments that now have grown up between it and appellants during this long time, for it to be taken from them now." All these grounds may well be grouped into three classes: 1. The child's welfare and wishes; 2. The contract of its parents; and 3. The equity of the grandparents, appellants.

The welfare of a child, its life, health, and moral and intellectual being, should be, and are, kept well in view by the courts in determining its legal disposition in litigations over it. This is not upon the ground, sometimes supposed, that courts of equity will overrule the claims of nature, or substitute their discretion as to the child's welfare for the responsibilities imposed by God upon the parent. We apprehend, and, from an examination of the authorities, we gather, this course is justified and applied only in cases where a parent asks the court to change the child's possession, basing his claim upon a legal right—such, for example, as the legal right of the parent to the custody of his child. Then, and then only, will the court look to the welfare of the child, in withholding its aid; basing its action upon the principle that equity will not do a wrong [268] to aid a mere naked legal right. By statutory

enactment, the legislatures have provided for the state's taking charge of infants in extreme cases; but nowhere has it been held, so far as we are aware, that a parent, however indigent and ignorant, or even vicious, can be deprived by law of the custody of his child at the suit of a stranger, however opulent, charitably disposed, and prepared he may be to give the child advantage of coveted opportunities for its moral or intellectual development. The day may come when society will demand and exercise some such right. Perhaps it may be recognized in milder form by some in legislation for compulsory attendance at schools. But, in the broad sense suggested, it certainly is not here yet. We hold that when it is shown by the suing claimant parent that he or she is a person of moral habits, of good health (that is, without contagious or infectious disease), and of enough industry to reasonably insure the child from want and positive distress, these conditions, coupled with the parent's legal right, will overcome the supposed advantages accruing to the child by the adverse claimant, a stranger, who merely shows that he possesses fortune, character, kindliness, and affection for the child; and that, too, even though the court might well consider that the opportunities afforded by the stranger are the most favorable for the infant's welfare. The experience in this country is not that wealth, especially when coupled with indulgence, is always most conducive to a useful education and the foundation of the best character. We apprehend that the best part of the child's education will not be obtained at some ideal social institute, though beginning with a kindergarten and ending with a university, but generally at the hearthstone of its family, if that family be a proper one. The welfare of the child is not merely training its head, but includes training [269] its heart. Wisdom may be imparted by teaching it to think; the feelings that at last make the man, by teaching it to feel. Orphanage, even partial, is generally conceded to be a misfortune, and universally moves to pity, but it likewise carries a privilege and an opportunity. The boy who, taught by the stern lessons of necessity and the inscrutable ties of fellow-suffering and gratitude to revere his mother, and to help her bear the burdens of widowhood and overcome the adversities of untoward conditions, has accumulated an asset of more value, perhaps, than had his disappointed benefactor been allowed to exploit his plans of education at the sacrifice of filial devotion. "Honor thy father and thy mother" is a command, followed by a promise, of peculiar value

in determining the welfare of the child. It is argued, and in some instances has been held, that the wishes or election of the infant will be regarded in determining this question. Generally, those instances where the wishes of a child of sufficient maturity to realize in a measure its situation have been allowed to control were either in a controversy between parents upon their separation, or where the facts of welfare were so nearly balanced as to leave the court in grave doubt, in which case the wishes of the child were consulted and given some weight. However, it has not been held anywhere, so far as we have been cited, that the judgment of the infant is to control independent of or despite other circumstances. We hold that an infant cannot dispose of his property of the smallest value, or become bound by contract generally, because of the conclusive presumption that he has not a sufficiently matured judgment to know what his interests are. We cannot, therefore, hold that the determination of a question involving such serious and permanent importance to him as the training of his youth should be at his disposal.

270 The contract relied upon, in so far as it purports to bind appellee, having been entered into by her while under the legal disability of coverture, was not binding upon her. It was void. We are unable to distinguish it, so far as affecting the feme covert's contractual ability, from any other contract relating to her legal or property rights. If the paper ever had any legal value, it was only to the extent of transferring the legal right of the father to the custody of his infants. It could convey, at most, only such right as he held, which, of course, terminated with his death. Thereupon the mother's right of exclusive possession began.

The record discloses that appellants are estimable and worthy old people, who doubtless would bestow on this grandchild every fair opportunity within their power for its material advancement. Their love for it, natural and cultivated, is clearly shown by the circumstances put in evidence. The separation decreed by the circuit court must seem to them, viewed from their standpoint, as a hardship. These facts are argued by their counsel here as presenting an equity entitled to be regarded by the court, in connection with the child's welfare, in decreeing its custody. The utmost the court could be expected to do would be to measure the equities of these contending parties. It requires no judicial determination to properly estimate the mother's love—probably the strongest instinct of the

species. This temporary separation, enforced by conditions beyond her control, instead of weaning her from the child, appears to have intensified her yearning. As between the two—the grandparents and the mother—we do not feel at liberty to change the responsibility of the parent, and the privilege and duty of the child, from where God has placed them. The judgment of the circuit court is therefore affirmed.

In Determining Who shall be Given the Custody of an infant, the court will have regard for the child's welfare: Miller v. Miller, 38 Fla. 227, 56 Am. St. Rep. 166, 20 South. 989; Jones v. Darnall, 103 Ind. 569, 53 Am. Rep. 545; Hussey v. Whiting, 145 Ind. 580, 57 Am. St. Rep. 220, 4 N. E. 639; note to State v. Smith, 20 Am. Dec. 333; and also for the child's wishes, when it has reached the age of intelligent discretion: Neville v. Reed, 134 Ala. 317, 92 Am. St. Rep. 35, 32 South. 659; Marshall v. Beams, 32 Fla. 499, 37 Am. St. Rep. 118, 14 South. 95; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212. But a court cannot deprive a parent of the possession of a child, unless it is shown affirmatively that he or she is unfit to have its custody, or has in some way forfeited the right thereto: Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373. And a strong case must be made out to justify placing a child with a third person as against the demand of a parent: Lovell v. House of the Good Shepherd, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660. Contracts for the transfer of parental custody and responsibility are discussed in the monographic note to Fletcher v. Hickman, 88 Am. St. Rep. 866-875.

JOHNSON v. WILLIAMS.

[111 Ky. 289, 63 S. W. 759.]

ARREST—Killing Innocent Person in Attempting.—The law which gives an officer the right to kill an escaping felon requires him to know that he is the felon, not an innocent person, whose life he is attempting to take. (p. 420.)

ARREST—Killing Innocent Person by a Deputy.—If a sheriff's deputies attempt to arrest an innocent person, erroneously supposing him to be a felon whom they have been sent to apprehend, and kill him as he tries to escape, the sheriff and his sureties, under the Kentucky statutes, are liable therefor. (p. 420.)

OFFICIAL BONDS.—Exemplary Damages cannot be recovered in an action upon the bond of a public officer. (p. 421.)

J. C. Flournoy, Robertson & Thomas and R. T. Tyler, for the appellants.

John W. Ray and Shelbourne & Kane, for the appellee.

[292] PAYNTER, C. J. This action was instituted by the appellee against the appellant, T. H. Johnson, sheriff, and the sureties in his bond, for the alleged negligent killing of the intestate, Charles Williams, by two of his deputies. Dave Browder murdered a negro. Ernest Johnson and H. C. Judge were deputies under Johnson, and were sent to arrest him for the crime which he had committed. They went to Casye, a small village, where Browder seems to have lived, with the view of accomplishing his arrest. It was there ascertained that he had gone to Moscow, a near-by village, to see his father, as he said he would not surrender until he had a consultation with him. It was thought probable that he would return to Casye. So the parties started in the night-time, with the view of apprehending him. Johnson and Judge went to a point where the Moscow road crosses another one. Shortly after reaching that crossing two men were discovered approaching in a buggy, leading behind them a gray horse. The deputies had been informed that Browder was riding a gray horse, and they also claim that they thought they recognized the voice of [293] one of the parties as being his. The deputies claim they halted them as they approached, and, instead of stopping the speed of the horse, they increased it, and after the buggy had passed them they fired, with the intention of preventing Browder's escape. It turned out that he was not in the buggy, but a young man by the name of Campbell, and with him was Charles Williams. One shot took effect in Williams' head, from which he shortly thereafter died. Campbell testified that as soon as the deputy sheriffs cried "Halt," he holloed "Whoa" to his mare, and about that time the deputies began to fire on them. There is also some testimony tending to show that the ball which killed Williams entered his forehead. The whole defense is based upon the idea that the deputy sheriffs had the right, if it was necessary to do so to prevent Browder's escape, to kill him; that, as they had probable cause for believing that he was one of the occupants of the buggy, they therefore had the right to shoot, and, if in doing so they killed Williams, there is no more liability than there would have been had Browder been killed. The case was tried, at the instance of the defendants, upon the theory that they had the right to kill Browder under the circumstances detailed by them, and that there is no more liability created for the killing of Williams than there would have been had they killed Browder. It is not denied that the deputies were acting virtute officii, as the defendants sought to escape liability upon

the grounds that they were so acting, and that they had acted properly. It is not claimed that the killing was colore officii. In the court below both the plaintiff and defendants endeavored to try, and did try, the case upon the theory that an officer has the right to shoot one charged with felony, to prevent his escape.

[294] The opinions of courts and the writers upon criminal law recognize the rule to be that an officer has the right to shoot one charged with a felony, to prevent him from escaping. It was so held by this court in Head v. Martin, 85 Ky. 480, 3 S. W. 622. But we do not decide whether or not the deputies would have been authorized, in law, to have shot Browder, had he been in the buggy, attempting to prevent arrest by fleeing. Whether fleeing under such circumstances is such an escape, in the meaning of the law, as would authorize officers who have a warrant of arrest for one on a charge of felony to shoot him, we do not decide. Courts recognize the rule to be that if a process is put in the hands of an officer to execute against B, and he seizes the goods of A under it, he is liable on his official bond to A, for damages: Town of Norwalk v. Ireland, 68 Conn. 1, 35 Atl. 804; Norris v. Mersereau, 74 Mich. 689, 42 N. W. 153; Welter v. Jacobson, 7 N. Dak. 32, 66 Am. St. Rep. 632, 73 N. W. 65. It was held in Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. Rep. 286, that the taking by a marshal of the United States, upon a writ of attachment against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. It has been held that an illegal arrest is a breach of a bond to faithfully and without oppression discharge all duties required by law: Yount v. Carney, 91 Iowa, 559, 60 N. W. 114. It was held in West v. Cabell, 153 U. S. 78, 14 Sup. Ct. Rep. 752, that a warrant to arrest James West for murder will not authorize the marshal to arrest Vandy M. West, and for the arrest and imprisonment of the latter on such warrant by one of his deputies the marshal and his sureties are liable upon his official bond. Murfree on Sheriffs, section 60, says: "On the common-law principles governing the ordinary relations of principal [295] and agent, a sheriff would not be responsible for an act done by his deputy colore officii; but it is held in Virginia and West Virginia that on principles of public policy, applying to the relation of a sheriff and his deputy, the former is liable in such a case; and, on the same principle, it would seem that he and his sureties are liable on his official bond. In a Massachusetts case (Knowlton v. Bartlett, 1 Pick. 273) the court says: 'If the act from which the injury resulted

was an official act, the authorities are clear that the sheriff is answerable. If it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office. If so, no action could ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office.' To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting colore officii, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to any one while acting under color of his office. And, if the sheriff and his sureties are bound for such acts of the deputy while acting under color of his office, then the deputy and his sureties are liable to the sheriff for his act." In Brown v. Weaver, 76 Miss. 7, 71 Am. St. Rep. 512, 23 South. 388, it was held that an officer had no right to shoot a misdemeanant to prevent his escape, and that if he was unjustifiably shot by a deputy sheriff in attempting to arrest him under [illegible] a warrant, or in attempting to prevent his escape after arrest, he can maintain an action for damages on the official bond of the deputy's principal. In Head v. Martin, 85 Ky. 480, 3 S. W. 622, the court held that an officer had no right to shoot one charged with a misdemeanor, while escaping. It does not appear from the opinion what was the purpose of the action, but, as it was not a criminal prosecution, it must have been an action for damages. This court, in Shields v. Pflanz, 101 Ky. 407, 19 Ky. Law Rep. 648, 41 S. W. 267, held that a sheriff was responsible for the mistreatment of the prisoner by his deputy while conveying him from one county to another.

The covenants of the sheriff's bond required him to faithfully discharge the duties of his office. This imposes the duty of executing the processes which the law authorizes to be issued and placed in his hands, and to make arrests in the manner and upon the conditions imposed by law. If he attempts to make an arrest, and in doing so inflicts an injury in violation of law upon the party sought to be arrested, or upon another, then he and his sureties are liable for the damages sustained. If the sheriff, in executing an order of attachment against the property of

one person, seizes that of another, he and his sureties are liable. If he should seize the property of one not a defendant in the execution, and sell it to satisfy it, he is liable on his bond for the tort. If he has a warrant against one, and under it arrests another, he is liable on his bond for the tort thus committed. He cannot justify the wrongful arrest by showing he believed, and had reasonable grounds for believing, that he was executing it upon the party named in it. If he cannot in that way justify a wrongful arrest, much less should he be permitted to justify the killing of another by showing that he had [297] probable cause for believing that he was shooting at the party whom he was authorized to arrest. The law which gives an officer the right to kill an escaping felon certainly requires him to know that he is the felon, not an innocent party, whose life he is attempting to take. The question here is quite a different one from what we would have if the deputy sheriffs had shot at Browder while escaping, and killed Williams. In the latter case, they would have been shooting at the right man, if the facts justified it, but here they shot at and killed an innocent man. While they did an unlawful act, still they were acting in their official capacity. They had the authority as deputy sheriffs to arrest Browder, but in the exercise of that authority they acted improperly, abusing the confidence which the law imposed in them. They were guilty of misconduct in office for which their principal and his sureties are liable; for section 4141, Kentucky Statutes, provides: "The sheriff may, with the approval of the county court, appoint one or more deputies, and take bond to himself for the faithful discharge of his duties of such deputies; but in all cases the sheriff shall be liable on his bond or bonds for any misconduct or default of such deputies; any deputy may be removed at any time by the sheriff."

The instructions which the court gave were more favorable to the defendants than they were entitled to have given to the jury, except the one on the measure of damages. The part of the instruction giving the measure of compensatory damages is substantially correct, but the instruction also authorized the jury to award punitive damages. Punitive damages might have been awarded against the deputies who killed the decedent, but it is not proper that they should be given against the sheriff and the sureties in his official bond. The covenants of the bond [298] do not require the sureties to do more than compensate an injured party for the actual damages which he may have sustained by reason of the misconduct of the sheriff or his deputies. Its cove-

nants do not require them to pay a sum of money which is inflicted by way of punishment. They have committed no wrong, and therefore the reason of the law which allows exemplary damages against wrongdoers can not make it apply to them. In fact, the reasons which allow a recovery of exemplary damages would forbid their assessment against sureties in the official bond. This is an action upon contract. Usually exemplary damages are allowed only in actions of tort. It has been held in some cases that where the condition of the bond given in pursuance of the statute is broken by the commission of a tort, such as would be a proper cause for exemplary damages, such damages may be recovered in the action on the bond. But it is stated in Sedgwick on Measure of Damages, section 370, that "this is contrary, however, to the current of authority, which is to the effect that only compensatory damages can be recovered in an action on a statutory bond." While the court should not have given an instruction awarding exemplary damages, still the verdict was only two thousand five hundred dollars. Considering the evidence as to the age and health of the young man who was killed, the jury could not have included in their verdict any exemplary damages. The judgment is affirmed.

BURNAM, J., dissenting. In my opinion, the act of the deputies in killing decedent was not in discharge of an official duty; hence the securities on the sheriff's bond cannot be made liable under the facts of this case, and I therefore dissent from this opinion.

The Right of an Officer to kill a felon or misdemeanant who resists arrest or flees therefrom, is discussed in State v. Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669, and monographic note, pp. 697, 699; Brown v. Weaver, 76 Miss. 7, 26 South. 388, 71 Am. St. Rep. 512, and monographic note. In this latter note the liability of the sureties of an officer when he or his deputies inflict personal injuries is considered.

CITY OF PADUCAH v. ALLEN.

[111 Ky. 361, 63 S. W. 981.]

MUNICIPAL CORPORATION.—The Location of a Pesthouse by a city near a farm and the residence thereon is an injury and a taking of the adjacent property for which compensation must be made. (p. 424.)

MUNICIPAL CORPORATION—Pesthouse.—The Measure of Damages for permanently locating a pesthouse adjacent to private premises, in the absence of actual communication of disease, is the depreciation in the market value of the property. (pp. 425, 429.)

MUNICIPAL CORPORATION—Pesthouse.—Evidence of the Depreciation in Value of adjacent property from the establishment of a pesthouse should be confined to the testimony of witnesses acquainted with the property, its value, or the value of similar properties in the vicinity and their market values, and with the fact to what extent these market values have been affected by the location of the pesthouse. (p. 426.)

MUNICIPAL CORPORATION—Pesthouse.—To Prove that the Market Value of adjacent premises has not been impaired by the location of a pesthouse, evidence is admissible of what adjoining properties of the same character sold for just before and since the establishment of the pesthouse. (p. 427.)

R. T. Lightfoot, for the appellant.

Greer & Reed, for the appellee.

[364] O'REAR, J. In 1897, the city of Paducah, having bought about twenty acres of land about three miles from its corporate limits, located and established a hospital upon it for the purpose [365] of treating eruptive diseases. The property acquired by the city lies on the east side of appellee's farm. The hospital on this tract is about two hundred and fifty yards from the fence of appellee, and about one-half mile from his residence. After the establishment of this hospital, and after it had been maintained by the city for some two or three years, appellee brought this action to recover of appellant damages sustained to his farm by reason of the location and maintenance of the pesthouse. The hospital was established principally for the treatment of smallpox patients. It was the claim of the appellee that the locating of this pesthouse in such close proximity to his farm and to his residence tended to so impair their value —that is, their market value either for selling or renting purposes—as to practically diminish it by half. He asserted that his farm of three hundred and twenty-five acres was worth twenty thousand dollars. The proof introduced on his behalf

shows that it was worth from five thousand dollars to twenty thousand dollars, it taking a wide range according to the opinion of the various witnesses. The trial resulted in a verdict and judgment for appellee against the city for two thousand five hundred dollars damages.

Various grounds are urged here with much earnestness and force why the judgment should be reversed. We will state and dispose of them in the order of their importance. It is argued on behalf of the city that, inasmuch as it is required by the statute law of the state and by existing conditions to establish and maintain a hospital, which, under the mandate of the statute, it is compelled to establish within not less than one mile of the limits of an incorporated town or city, it cannot be mulcted for having performed this duty, unless it has done so in a negligent or unskillful manner; that, having used care in the establishment of its hospital, it cannot be liable to appellee, unless in the matter of the managing or conduct of the hospital, [illegible] it be done negligently, and thereby damages ensue to him. It is contended that the action of establishing and maintaining a pesthouse or other hospital is a governmental function, which the courts will not interfere with nor control so long as due regard has been had to the law governing its establishment. Prior to the adoption of the present constitution of this state, such may have been the rule with regard to liability of municipalities. However, section 242 of that instrument provides: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction." Concerning this section this court has, in substance, held, and in considering similar sections of state constitutions the United States supreme court has held, that a recovery may be had in cases where private property has sustained a substantial damage by making and using an improvement that is public in its character by the municipality, although the damage shall not be caused by a trespass or an actual physical invasion of the owner's real estate: City of Ludlow v. Detweiler, 20 Ky. Law Rep. 894, 47 S. W. 881; City of Mt. Sterling v. Jephson, 21 Ky. Law Rep. 1023, 53 S. W. 1046; City of Henderson v. McClain, 102 Ky. 402, 19 Ky. Law Rep. 1451, 43 S. W. 700; City of Chicago v. Taylor, 125 U. S. 162, 8 Sup. Ct. Rep. 820. This principle, or one

quite analogous, is also frequently applied in the case of slaughter-houses and similar institutions erected by private individuals or private corporations in such close proximity to another's premises that noxious odors, gases, noises, and other elements tending to so disturb and endanger [367] the lives or health or to discommode the comfort of the occupant of the adjacent premises as to materially depreciate their value and use, and such have been held to be actionable. These actions are generally maintainable upon the theory that the maintenance of the particular institution or business is a nuisance. So it has been held that a pesthouse erected by a town, municipal or county authorities near the premises of another, injuring the health of his family, or exposing them to a contagious disease, is a nuisance, for which an action will lie: Wood on Nuisances, sec. 68. See, also, Clayton v. City of Henderson, 103 Ky. 228, 20 Ky. Law Rep. 86, 44 S. W. 667. We therefore conclude that, where a city or other municipality erects and maintains a public institution, which, by reason of its nature, endangers the lives or health of the occupants of adjacent premises, as by subjecting them to contagious or infectious diseases, it is not only a nuisance, but it is such an invasion of the property rights of such adjacent holder as amounts both to an injuring and a taking of property, under the section, supra, of our state constitution. For this the city must make compensation.

There was much evidence introduced on the trial as to the extent of the danger to persons on appellee's premises, it being the effort of the city to show that the danger was more imaginary than real, and at best was so remote and improbable as to be practically nil. Many medical witnesses of apparent good standing testified that, while the disease was one both contagious and infectious, under the systems of treatment now in use there was practically no danger of the disease being contracted as much as thirty feet away from the subject when not confined in a close room with it. Indeed, some of them testified that in the open air there was no danger of contracting the disease a [368] distance of from four to six or eight feet, and practically all of them united in saying that the danger was theoretical or imaginary altogether from a distance of one hundred and fifty feet. They claim that such is the experience of their profession, and such the opinion of their accepted authorities and writers. On the other side the testimony of many citizens was introduced to the effect that the very fact of the existence of the pesthouse in such close proximity to appellee's premises had caused alarm

and anxiety to all having occasion to visit there or use them, made it difficult to keep servants and workmen employed upon his place, estranged his friends and visitors from his place and made the property so undesirable in the public estimation as to materially decrease its vendable or market value. And right here we may say is the storm center of appellant's objections and contentions upon this appeal. It is its insistence that the establishing and maintenance of a pesthouse in such proximity to other persons' property is not per se a nuisance; that damages should not be allowed for any injury unless it be shown to be actual and real; and that injury, it is argued, should be, not the public's estimate of the situation, but the real danger to which appellee and those occupying his premises were subjected because of the location and treatment of the diseased patients at the pesthouse. We have stated above that the location of this pesthouse at the point and under the circumstances indicated was such an invasion of the property rights of the adjoining owner as to entitle him to recover for damages sustained. Now, what is the damage that he has sustained? Is it alone that he and the members of the family are subjected to an actual danger of contracting a loathsome and dangerous disease? Or is it the annoyance and loss that he may sustain by reason of being deprived [369] of a portion of his premises or the use thereof, because by reason of its close proximity to the pesthouse his servants will not, and cannot in safety, cultivate it to the line? Or is it the diminution of the salable value of his property in so far as that value has been affected? So far as the facts in this case are concerned, it may be stated that there is no claim that the disease has actually been contracted by any member of appellee's family, and therefore we do not feel called upon to determine to what extent such a fact, had it existed, would have been actionable against the city. If it be a fact, or be shown that the establishment of the pesthouse is permanent, it is the market value—that is, the selling and renting value of the owner's premises—that must be the measure of his damages. They are as much his property as is the right to peaceably possess and personally enjoy it. It is generally this market value that is the criterion in measuring damages when property has been injured that is adopted by the courts for lack of a more uniform, certain, and satisfactory one. Therefore, to the extent that this market value has been impaired by the establishment of appellant's pesthouse at the point in controversy, appellee ought to be reimbursed by the city. It is well known and universally

recognized that smallpox is a very contagious, as well as a most loathsome and dangerous, disease; that its presence, though beyond the point where an expert would determine was that of actual danger, is a fact that naturally and almost universally excites alarm, uneasiness and repulsion. All avoid its neighborhood. Therefore, lands located in very close proximity to a place where this disease is rightfully, and at all and any times liable to be, treated, [370] and from which proximity the disease is liable to infect the adjoining premises, creates in the mind of the public an aversion to that immediate locality. It necessarily results in the impairment of the value of the property within the affected district. It was proper, therefore, to submit the question to the jury to what extent appellee's property had been diminished in its market value by reason of the location and maintenance of this pesthouse, in connection with the question of probability of those upon appellee's premises becoming infected with the disease because of such enforced proximity to it.

In the course of the introduction of the evidence (and there was much of it of the character described without going into it in detail) many witnesses were allowed to testify for appellee without showing themselves to be qualified by a sufficient acquaintance with the property, or with the market value of that or similar property, to be able to testify thereof. They, however, were permitted to state to the jury that, in their opinion, the value of the property was diminished one-half. Some used the expression, "It would be worth nothing to me." All of this class of evidence should have been excluded, and appellee should have been confined to the testimony of such witnesses who showed that they were acquainted with the property, its value, or the value of similar properties in the same vicinity and their market values, and with the fact to what extent these market values had been affected by the location of the pesthouse. The proper question would be: What was or would be a reasonable market value of the premises in question but for the location of the pesthouse, and what was its actual market value with the pesthouse located and maintained as it was? We are of the opinion that to the extent that the evidence [371] of the class above criticised was admitted (and it was of a material quantity, in our opinion) it was error in the court. On the trial, appellant offered to prove by various witnesses what adjoining properties of the same class and character had been sold for just before and since the location of the pesthouse, it

being thus attempted to prove that the market value of this property had not been impaired to the extent indicated by the opinions of appellee's witnesses. Of course, market value is the price at which an article sells in the market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses; for, truly, here is where "money talks." Thus, in Sutherland on Damages, 799, it is said: "Evidence of actual sales of other similar property to that in question may be shown. It is competent to prove the value of other like property by which the property in question may be compared. It was held in an Illinois case, in an action to recover damages for the breach of a contract to convey land, that the plaintiff, in order to show the value of the premises in controversy, might prove, not only the worth of other adjacent property at or near the date of such contract, but even the value of land of a different quality, lying in the immediate vicinity, leaving it to the jury to determine the difference in value." We are of the opinion that it was error in the trial court to reject the testimony above mentioned.

The court gave the jury the following instructions:

"Instruction No. 1. The court instructs the jury that the law of this state made it the duty of the city of Paducah to locate and build a suitable smallpox pesthouse in McCracken county, not nearer the city limits, however, than [372] one mile. And the court further says to the jury said city had the legal right to locate, build and carry on the smallpox pesthouse for the care of smallpox patients at the place described and complained of in plaintiff's petition. Yet, while this is true, if the jury shall further believe that by reason of the proximity of said pesthouse to the tract of three hundred and twenty-five acres of plaintiff's land, where he lives, the same has been injured in value, the law entitles him to recover in this action damages commensurate with such injury, sufficient to compensate him therefor, according to further instructions herein.

"Instruction No. 2. The court further instructs the jury that if you shall believe, from the evidence in this case, that by reason of the nearness of said pesthouse to the said land of the plaintiff, or any portion thereof, there is real probable danger of the smallpox being communicated through the atmosphere from said pesthouse to and upon a portion or all of plaintiff's land, so as to really cause any persons thereon to take the

smallpox, or really placing them in danger of taking it, and that by reason of such jeopardy the value of plaintiff's land is thereby lessened to the extent of a part or the whole of the tract, you will find for the plaintiff such sum in damages as you may believe from the evidence such portion or all of the tract has been so damaged or lessened in value by such proximity of said pesthouse, not exceeding the sum claimed in plaintiff's petition.

"Instruction No. 3. But the court further instructs the jury that unless you shall believe, from the evidence in this case, that there is a real probable danger of the smallpox being carried through the air from said pesthouse to and upon said land of the plaintiff, and persons thereon becoming infected therewith and taking the smallpox, then, and in such case, there is [373] no legal cause of action against the defendant in this case; and you will find for the defendant, although you may believe from the evidence many persons other than the plaintiff are alarmed and express their fears of the smallpox anyhow. The meaning of this instruction is that you should not find for the plaintiff unless you shall believe from the evidence there is real probable danger that the air or the wind from the pesthouse will blow the smallpox onto and give it to people on Allen's said land.

"Instruction No. 4. The court further instructs the jury that, although you may believe from the evidence that there is a real probable danger of the smallpox being blown from the pesthouse onto and infecting persons on plaintiff's land nearest the pesthouse, yet if you shall fail to believe from the evidence there is any real danger of its being blown upon the still more remote portion of the tract, you will not consider such remote portion of the tract in making up a verdict for compensatory damages."

The appellant criticises the statement in the instructions "that there must have been a real probable danger of the smallpox being communicated through the atmosphere from said pesthouse and upon a portion of the plaintiff's land," etc. The court evidently intended by the term "real probable danger" to say that the probable danger must be an actual fact, as distinct from one solely imaginary or apprehended. Upon the whole, we think the instructions, except as to measure of damages, are more favorable to appellant than it was entitled to.

It will be observed that the court failed to give to the jury a criterion or measure of damages in his instructions. An in-

struction on this point was offered by appellee as follows: "Instruction No. B. The court instructs the jury that, if they should find for the plaintiff, then that [874] the criterion or measure of damage is whatever amount plaintiff's farm has been depreciated in market or salable value by reason of the defendant's locating of and the maintaining of its pesthouse and carrying on the same in proximity to his farm." This instruction was objected to by appellant, and was refused by the court. We think it fairly embodies the law in this case applicable to this subject, and should have been given.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to award appellant a new trial under proceedings not inconsistent herewith.

Whole court sitting.

GUFFY, J., dissenting. The instructions given are more favorable to defendant than it was entitled to. If the establishment of the pesthouse has caused a decrease in the value of the land, and that without regard to the fact whether or not there was real danger of persons taking the smallpox by reason of the establishment of the pesthouse, I do not think that the court erred to the prejudice of defendant as to the admission of the testimony. I think the judgment should be affirmed.

A City may Establish a Smallpox Hospital on its own property, so it has been held, without violating a constitutional guaranty that private property shall not be damaged for public use without just compensation; and no action for damages will therefore lie for injury to property in the neighborhood, where such hospital is rightfully located and well conducted: Frazer v. City of Chicago, 186 Ill. 480, 78 Am. St. Rep. 296, 57 N. E. 1055. Compare Baltimore v. Fairfield Imp. Co., 87 Md. 352, 67 Am. St. Rep. 344, 39 Atl. 1081; and see the note on this question to Markham v. Brown, 92 Am. Dec. 76-80. A similar ruling is made in case of the erection of a prison building in Long v. Elberton, 109 Ga. 28, 77 Am. St. Rep. 363, 34 S. E. 333.

LEXINGTON RAILWAY COMPANY v. COZINE.

[111 Ky. 799, 64 S. W. 848.]

CARRIER—Exemplary Damages for Assault by Conductor.— A street railway company is liable in exemplary damages for a malicious assault upon a passenger by a conductor in the course of his employment. (p. 433.)

Morton & Darnall, for the appellant.

James G. Denny and George Denny, for the appellee.

801 BURNAM, J. This action was instituted by plaintiff against the defendant to recover damages for a malicious assault made upon him by one of the defendant's employés in the course of his employment. It is alleged by plaintiff that he was a passenger on one of defendant's cars, and had paid the usual fare; that the defendant's conductor in charge of the car, without provocation, wantonly and maliciously assaulted, beat, and bruised him. A general demurrer was filed to the petition, and also a motion to make it more specific. Both were overruled. The defendant thereupon answered that the plaintiff made an assault upon its conductor at the time and place mentioned in the petition 802 and would have beat, bruised, and ill-treated him if he had not immediately defended himself; that the conductor used no more force than was necessary to defend himself, and in so doing did beat and bruise plaintiff. But it denies that such action was wanton or malicious or done with its knowledge or assent. The reply denied that plaintiff had made an assault upon defendant's conductor, or that the conductor used no more force than was necessary to defend himself. Upon this issue a trial was had, which resulted in a verdict for the plaintiff.

The facts attending the assault, as testified to by a number of witnesses, were substantially as follows: Plaintiff boarded defendant's car, paid his fare, and requested to be let off at the Lexington Laundry. As the car approached the laundry, plaintiff signaled to the conductor to stop. Failing to attract his attention, he reached up to pull the bell cord, but by mistake got hold of the wrong cord, and rung up a fare. The conductor thereupon came back and asked what he rang the bell for, and said, "You owe me a nickel." Plaintiff responded, "I have already paid you, but I will give you another nickel," and shoved it along the seat, and at the same time arose for

the purpose of alighting. The car, however, did not stop, and he remarked to the conductor, "If you do not stop the car, I will ring the bell again." At the time he said this he was holding to the side of the car with both hands, and standing on the footboard. The conductor responded, "No, damn you, you won't!" and immediately struck him twice in the face, bruising one eye and cutting a gash in his face. Plaintiff was a cripple, and partially paralyzed in both legs from the knees down, and was making no effort at all to assault or otherwise injure the conductor.

At the close of the testimony the court instructed the [803] jury, first, that they should find for the plaintiff, "unless they should believe from the evidence that at the time defendants' agent, J. L. Lloyd, assaulted the plaintiff, said Lloyd believed, and had reasonable grounds to believe, that plaintiff was then and there about to assault said Lloyd, and that it was necessary, or to said Lloyd reasonably appeared to be necessary, to strike the plaintiff, to avert the danger that had arisen, or appeared to said Lloyd to have arisen, to him at the hands of the plaintiff. 2. If the jury believe from the evidence that at the time Lloyd, the defendant's agent, assaulted the plaintiff, said Lloyd believed, and had reasonable grounds to believe, that he was then and there in danger of some personal violence at the hands of plaintiff, and it was necessary, or to said Lloyd reasonably appeared to be necessary, to assault the plaintiff to avert the danger, and if the jury further believe from the evidence that said Lloyd used more force to repel the violence than at the time reasonably appeared to be necessary, the jury should find for the defendant." The third instruction defined the measure of compensation, and further told the jury that, if they believed from the evidence that the assault made upon the plaintiff was inspired by malice on the part of said Lloyd toward the plaintiff, they might allow the plaintiff punitive damages, by way of punishment.

It is contended by appellant that, as the reply failed to deny the averment of the answer that the assault by the defendants' conductor "was made without their knowledge or assent," the court erred in the third instruction, in allowing the jury to impose punitive or exemplary damages because of the malice of their conductor; in other words, that the court, under the pleadings and facts of the case, erred in submitting to the jury the question [804] of punitive damages at all. There is perhaps no question of law in which there has been greater diversity

of opinion by courts of last resort than whether a corporation is liable for exemplary damages for the unauthorized malicious acts of its agents or servants, committed in the course of their employment. The doctrine of the federal courts upon this question, as settled by recent decisions of the supreme court of the United States, is: "1. That a corporation is not liable to exemplary damages except where a natural person would be liable to such damages for a similar act done by his agent or servant; 2. That a natural person is not generally liable for such damages except where he has commanded the doing of the oppressive act, or subsequently ratified it": Lake Shore etc. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261. The opinion, however, concedes that corporations may be liable to exemplary damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. And this rule of the federal courts is in accord with the principle announced by a number of state courts in passing upon the question. But, on the other hand, a great majority of the American state courts hold that a corporation is liable in exemplary damages for the willful, malicious, oppressive, insulting, or fraudulent act of its servant, although it had not precisely authorized or subsequently ratified it, if the act was committed by the servant in the course of his employment, and while acting within the scope of his authority: Hutchinson on Carriers, sec. 815a, and 5 Thompson on Corporations, sec. 6338. In discussing this question, Mr. Wood, in his work on Railroads, section 317, page 1417, says: "It was at one time regarded as improper [805] to hold the principal liable for the willful or malicious acts of his agents, and consequently exemplary damages were not recoverable against a corporation for the act of its servants unless it was shown that it authorized or had ratified the act. But, since it is now almost universally held that the master is liable for the willful and even malicious acts of his servant in the line of his duty, the rule which is now generally held in the better class of cases, that exemplary damages may be given against a corporation for injuries inflicted by its servant willfully or maliciously, and whether authorized or ratified by it or not, seems to us to be consistent and just, especially when the action is for personal injuries received by a passenger to whom the company owes a contract duty, and in some of the states such damages are provided for by statute." The rule laid down by Suther-

land is: "If a corporation like a railroad company is guilty of an act such as in the case of an individual would subject him to exemplary damages, they would be equally liable to such damages. And when the servants of the corporation engaged in the carriage of passengers are guilty of such acts or conduct in the performance of their duties, in the transportation of the injured party as a passenger, as would subject them to damages of this nature, the corporation is also liable to punitive damages, without proof that they directed or ratified such acts or conduct": See Sutherland on Damages, 271. Pierce on Railroads, section 305, says: "Although compensation for the injury is the usual measure of damage, other damages in addition have been allowed where the author of the injury committed it maliciously, willfully, or even recklessly, or, according to some authorities, with gross carelessness. Such supplementary damages are called 'exemplary.'" Time does not permit, nor is [806] it needful, that we should undertake to cite the numerous cases in which this rule has been followed in other states. It is sufficient to say that it is too firmly grounded in the jurisprudence of this state to be now questioned. It has been emphatically approved in Louisville etc. R. R. Co. v. Ballard, 85 Ky. 311, 7 Am. St. Rep. 600, 3 S. W. 530; Louisville etc. R. R. v. Mitchell, 87 Ky. 327, 8 S. W. 706; Louisville etc. R. R. v. Long, 94 Ky. 410, 22 S. W. 747, and in numerous other cases. And while there is nothing in this record to show that appellant either authorized or approved the conduct of its conductor in this transaction, yet he was clearly acting in the line of his employment at the time of his brutal and unjustifiable assault upon a passenger who was entitled to his care and protection, and the case is clearly brought within the rule of law which authorized the instruction complained of.

Judgment affirmed.

That Corporations, including railroad and street railway companies, are answerable in exemplary damages for the willful, wanton, or malicious acts of their employés, see the monographic note to Hoboken Printing etc. Co. v. Kahn, 59 Am. St. Rep. 589-609; Mack v. South Bound R. R. Co., 52 S. C. 323, 68 Am. St. Rep. 913, 29 S. E. 905; Garrick v. Florida etc. R. R. Co., 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 34; Barker v. Ohio River R. R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148; St. Louis etc. Ry. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661.

BLAKE v. WOLFE.

[111 Ky. 840, 64 S. W. 910.]

JUDICIAL SALE—Effect of Reversal of Judgment.—The title acquired by the purchaser at a judicial sale, although he is the plaintiff in the action, is not devested by a subsequent reversal of the judgment. (p. 436.)

James M. Sebastian, for the appellants.

E. E. Hogg, for the appellees.

843 WHITE, J. In 1893 appellees, Wolfe, brought suit against appellant, seeking to recover a large sum alleged to be due them on account of a guardianship by appellant. That action finally terminated in a judgment in appellee Wolfe's favor for two thousand dollars, and a lien on a certain tract of land in Owsley county. Upon appeal to this court that judgment was reversed, with directions to dismiss on account of a plea of limitation. Pending the appeal, and before reversal, the land was sold under the decree, and purchased at decretal sale by the plaintiffs in that judgment, appellees, Wolfe, for some thirteen hundred dollars, being less than two-thirds of its appraised value. After the expiration of one year from the sale, it was confirmed, and deed made to them. After the confirmation, and yet before the judgment of this court on appeal, appellees, Wolfe, sold a portion of the land, and mortgaged the remainder, to appellee Jesse Wilson, to secure a debt due him. When the judgment in the former case was reversed, appellant Blake instituted this action, seeking to recover the land that had been sold under the decree in the former suit, making the Wolfes, Wilson, E. E. Hogg, and H. H. Harris parties defendant. It is not claimed that Hogg or Harris claim any part of the land, or any interest in same. In a second paragraph of his petition appellant asked a recovery against the Wolfes and 844 Wilson for two thousand three hundred dollars, the value thereof. There was an issue raised as to the bona fides of the deed and mortgage to Wilson, and also as to whether Wilson had actual knowledge of the appeal from the former judgment. Upon these matters proof was taken, and it may be said it was shown that the transactions were real, and in good faith, as the deed and mortgage show; and, further, if it was material, that Wilson knew ap-

pellant had prosecuted an appeal from the Wolfe judgment. On final hearing appellant was adjudged and given all the land that had not been sold and conveyed by Wolfe subject to the mortgage debt due Wilson, but was denied a recovery of that conveyed to Wilson. The judgment does not determine as to appellant's right to recover personal judgment against appellees Wolfe. That part of the pleading seems to have been abandoned or ignored, possibly for the reason that appellees Wolfe are alleged to be utterly insolvent. From so much of the judgment as determines Wilson's right to the land purchased by him, and as to the priority of his mortgage lien over the claim of appellant Blake, an appeal was granted by the trial court, which, as this record shows, is the only appeal.

The question as thus presented is as to the rights of Wilson as vendee and mortgagee of this land sold at judicial sale under an erroneous judgment, and there purchased by the appellees, and conveyed afterward to Wilson before reversal of erroneous decree of sale. The judgment rendered in favor of Wolfe against appellant Blake was not void, but merely erroneous. This being so, it is well settled that a judicial sale of the property of a judgment defendant, when purchased by a stranger, vests in him absolutely the title of the judgment debtor, and this title is not devested by a subsequent reversal of the judgment. [345] It is contended by appellant that the rule is different where a purchase is made by the judgment plaintiff, and that in such case a reversal of the erroneous judgment will set aside the sale, or render it void ipso facto. We are referred to the cases of Baker v. Baker, 87 Ky. 461, 9 S. W. 382, and Spicer v. Seale, 106 Ky. 246, 20 Ky. Law Rep. 1869, 50 S. W. 47, as sustaining the position. We are referred to other cases to support the same doctrine, but an examination shows they were cases of void judgments and sales, rather than erroneous. On the other hand, we are referred by appellees to the case of Yocum v. Foreman, 14 Bush, 494, and cases there cited, as conclusively settling the doctrine that, where the property of a judgment defendant is sold, the purchaser acquires title although the judgment be reversed. The cases of Baker v. Baker, 87 Ky. 461, 9 S. W. 382, and Spicer v. Seale, 106 Ky. 246, 20 Ky. Law Rep. 1869, 50 S. W. 47, were each where the property of strangers was wrongfully sold under an erroneous decree, and it was held that upon reversal of the erroneous judgment, to which the real owner was not a party, they would be entitled to restitution from the judgment plain-

tiff, who had purchased their property. In neither of these cases was the real owner of the property sold in a position to appeal from the judgment rendered, or supersede the execution thereof. In the one case, Jackson and Baker, who were given the land against the judicial sale, had acquired title prior to the judgment; in the other, Spicer had acquired title from the judgment defendant Chambers prior to the judgment under which the land was sold. However, there is nothing in either opinion that holds that a sale, under an erroneous judgment, of property of the supposed debtor against whom the judgment had been rendered, would be void or voidable after reversal. Indeed, [846] the Baker case, referring to the Yocum case, 14 Bush, 494, says: "But it was not then decided, nor do we think any consideration of policy would require or justify courts in holding purchases of property belonging to another than the judgment debtor as valid where the judgment had been reversed." The court had in the opinion quoted from the Yocum case, and had said that the rule is "limited in its application to title acquired under a judicial sale as against a defendant," thus expressly recognizing the rule in the Yocum case that a sale of a judgment defendant's property would pass title, although the judgment be subsequently reversed. The Spicer v. Seale case is distinctly placed on the authority of the Baker case, and quotes the limitation above. The opinion of Yocum v. Foreman, 14 Bush, 494, has never been questioned, and, where applicable, is yet the law. We are of the opinion that the cases of Baker and Spicer, supra, do not apply here, but that this case is governed by the case of Yocum v. Foreman, 14 Bush, 494. It follows that under the judgment sale the title passed to the purchaser Wolfe, and his conveyances to appellee, Wilson, both deed and mortgage are valid and binding. Appellees, Wolfe, are not complaining of the judgment as to them, and so there appears no errors to appellants' prejudice in the judgment appealed from.

There is no judgment against appellees, Wolfe, for damages for the value of the land lost to appellants, but as to this there was no appeal granted below, and no appeal has been asked of the clerk of this court. Even if that question was properly before us, there is no proof in the record upon which a judgment could have been rendered. The value of this land is not shown in the proof. This must be held to be an exception by appellants to that part [847] only of the judgment which adjudges in favor of appellee Wilson under his deed and mort-

gage, which we have said was not erroneous. Appellee Hogg appears to have no interest in this controversy.

Judgment affirmed.

Petition for rehearing by appellant overruled.

The Principal Case is cited and commented upon in the recent monographic note to Cowdery v. London etc. Bank, 96 Am. St. Rep. 137, on the reversal of judgments.

LOUISVILLE v. NORRIS.

[111 Ky. 903, 64 S. W. 958.]

MUNICIPAL CORPORATION—Sewers—Defective Plan.—If a plan for the construction of sewers is palpably bad, it will not excuse the city from resulting damage to private property to show that the execution of the plan was skillful. (p. 438.)

MUNICIPAL CORPORATION—Sewers, Care in Maintaining. When a city constructs a sewer, it is its duty to exercise ordinary care and skill to keep it in condition to carry off the water collected thereby from such rainfalls as may reasonably be expected to occur in the neighborhood drained. (p. 438.)

MUNICIPAL CORPORATION—Sewers, Notice of Defective. If the original construction of a sewer is manifestly deficient for the purposes intended, notice to the city of the defects is not necessary in order to fix its liability for injuries resulting to private property. (p. 438.)

MUNICIPAL CORPORATION—Injury from Sewer.—The Statute of Limitations, on an action against a city for the negligent construction of a sewer whereby property is flooded, runs only from the date of the flooding. (p. 439.)

H. L. Stone, city attorney, for the appellant.

Samuel B. Kirby, for the appellee.

[906] O'REAR, J. This is an action to recover of the city for the negligent construction of certain sewers, by reason of which appellee's property was flooded and damaged. The questions are: 1. Is the building of sewers by a city a legislative act, for which it will not be liable, even if it be an imprudent one? 2. Does the five year statute of limitation of this state apply from the date of the construction or from the date the injury is received?

1. Generally, a city will not be liable for error of judgment in its legislative body in doing a legislative act. [907] Whether a necessity for a given improvement of a highway exists is

clearly one for the legislative departments of the city to decide; also the character of the improvement is within the legislative discretion, subject to the qualification that the plan adopted must be one not so palpably inefficient as to indicate want of care, or to imply a failure to exercise judgment by the city governing body. So, when a municipality determines to change the natural order of things, by altering the surface drainage, and collecting it into artificial channels, it cannot fail to use ordinary good judgment in adopting the plan of the work, without liability to any injured thereby. If the plan adopted is palpably bad, it will not excuse the city from resulting damage to private property to show that the execution of the plan was skillful: Gould v. City of Topeka, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; McClure v. City of Red Wing, 28 Minn. 194, 9 N. W. 767; Teager v. City of Flemingsburg, 109 Ky. 746, 95 Am. St. Rep. 400, 22 Ky. Law Rep. 1442, 60 S. W. 718. On this point the trial court instructed the jury thus: "When the city undertakes to construct a sewer, it is its duty to exercise ordinary care and skill to keep it in condition to carry off the water collected thereby from such rainfalls as may be reasonably expected to occur in the neighborhood to be drained by such sewer." This application of the law on that subject is approved.

Appellant claims that, to be liable, the city must have had notice of the defects in the plan adopted by it, and that this notice should have been in the form of complaint by property owners after the defect had become apparent by experiment; in other words, that the city would not be liable for the first instance of damage, however heavy. The doctrine of notice invoked doubtless is that [908] applying to cases where an improvement was properly made, but had afterward become insufficient from accident, or sudden and unexpected change, without the knowledge of the city. But, where the initial construction is manifestly deficient for the purposes intended, that is, in the language of the instruction given, was not such as "ordinary care and skill" would suggest in order to "carry off the water collected from such rainfalls as may be reasonably expected to occur in that neighborhood"—notice need not be given the city. One must take notice of his own lack of care, and cannot rely upon being first warned of the dangers it threatens: Barton v. City of Syracuse, 36 N. Y. 54.

2. It being settled that the liability imposed under the foregoing was for the wrongful or negligent act of the city, constituting a nuisance (Wood on Nuisances, sec. 385), the com-

plaining lot owner was not compelled to sue till the damage had been done. His action was for damages sustained at the date of the flooding of his property. Limitation should date from that event: City of Louisville v. O'Mally, 21 Ky. Law Rep. 873, 53 S. W. 287.

The judgment is affirmed.

The Liability of City where it adopts a defective or inefficient plan of sewerage is discussed in the monographic note to Chalkley v. Richmond, 29 Am. St. Rep. 737-739. That a city is answerable for the negligent construction or maintenance of its sewers, see Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, ante, p. 133, and cases cited in the cross-reference note thereto.

The Statute of Limitations runs against a property owner's right of action for the unlawful flowage of his land only from the date of his suffering the injury, and not from the date of the completion of the structure which causes the flooding: Note to St. Louis etc. Ry. Co. v. Biggs, 20 Am. St. Rep. 177, 178; Kelly v. Pittsburgh etc. R. R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233; Eells v. Chesapeake etc. Ry. Co., 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479.

SECOND NATIONAL BANK OF LOUISVILLE v. MERCHANTS' NATIONAL BANK.

[111 Ky. 930, 65 S. W. 4.]

BANKING—Collections—Negligence of Correspondent.—A bank receiving notes for collection is not liable in respect thereto for the negligence of its correspondent, whom it exercises due care in selecting. (p. 441.)

BANKING—Collections—Negligence Respecting Correspondent.—If a bank, in a time of financial stress, forwards a note to another bank for collection, knowing that the cashier thereof is the secretary and treasurer of the corporation which executed the note, and the note is not paid nor heard from after maturity, it should make inquiry promptly, and notify the depositor without unreasonable delay; failing to do so, it is liable for its correspondent's negligence in not presenting the note for payment, or protesting it for nonpayment. (p. 442.)

BANKING—Collections—Negligence Respecting Correspondent.—If a bank receiving two notes for collection forwards one to its correspondent bank, but fails to hear from it after maturity, it is negligent in sending the other to the same bank. (p. 442.)

A. E. Willison, for the appellant.

Humphrey, Burnett & Humphrey, for the appellee.

933 HOBSON, J. The Second National Bank of Louisville made an agreement with the Merchants' National Bank of New Albany, Indiana, by which, in consideration of the New Albany bank depositing with it its surplus, it agreed to pay three per cent interest upon the daily balances in favor of the New Albany bank, and also agreed to do the collecting of that bank without charge. After this, on April 1, 1893, the Bedford Stone Quarries Company, a corporation doing business at Bedford, Indiana, executed its two negotiable notes to the New Albany Manufacturing Company, a corporation doing business in New Albany, Indiana—one for six hundred and fifty-two dollars and seven cents, due in thirty days, and the other for six hundred and fifty dollars, due in sixty days—both payable at the Bedford Bank, of Bedford, Indiana. The New Albany Manufacturing Company discounted the notes before maturity to the Merchants' National Bank, and the latter on April 22d sent the thirty-day note, which matured May 4th, to appellant by mail, for collection, and on May 13th sent it the other note in like manner. Appellant, on the same day that it received the notes, sent them to the Bedford bank for collection. On June 6, 1893, the Bedford bank assigned for the benefit of its creditors; and so, soon afterward, did the Bedford Stone Quarries Company, the maker of the two notes. On June 14th the two notes were returned to appellant unpaid and unprotested, and were returned by it to the New Albany bank. On the next day it returned them to appellant, claiming that diligence had not been used, and that by the failure to protest them the indorser was released. The notes were governed by the laws of Indiana, and thereby were placed on the footing of foreign bills of exchange. The indorser was therefore released, and, the maker being insolvent, it was insisted 934 by the New Albany bank that appellant was liable to it for the amount of the notes. The court below adjudged in favor of the New Albany bank.

That the Bedford bank was negligent, and that it is primarily liable for the loss is admitted; but appellant is not liable for the neglect of its correspondents. In Bank and Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38, this court said: "When a customer deposits with a bank a note, bill of exchange, certificate of deposit, check, etc., for collection at a point distant from the location of the bank, he must know the bank cannot send one of its officers or agents to such point to make the collection. He is presumed to know the method employed by banks in making such collections. He knows that the bank must select some

other bank or agency to aid in accomplishing the undertaking imposed on it. He has made the bank his agent for that purpose. He has employed the bank to do, through its method of making collection, that which would cost him much time and money to do himself. When he so engages the bank, and makes it his agent to make the collection, he does so with the implied understanding that the bank will follow the customary method in making such collections, which necessitates the selection of agents or correspondents at other points to carry out the undertaking; and the bank can only be held responsible for the exercise of due care and diligence in making such selection." The evidence in this case shows very conclusively that the Bedford bank was regarded as solvent, and appellant cannot be held liable for negligence in the selection of the agent. But there are other facts shown by the proof. The notes were both signed thus: "Bedford Stone Quarries Company, by W. C. Winstandley, Secretary and Treasurer." [935] W. C. Winstandley was also the cashier of the Bedford bank and appellant knew this. By the course of business between the two banks, if a note was collected the amount was immediately remitted by the Bedford bank to the appellant. When the note matured on May 4th, and nothing was heard from it, appellant should have ascertained the cause, and in a reasonable time thereafter have given notice to the New Albany bank of the situation. Notwithstanding this, on May 13th it forwarded to the Bedford bank the other note, and took no steps, so far as appears with any certainty, until June 7th, when in response to a letter from appellee a tracer was sent; and after this, on June 14th, the notes were returned by the Bedford bank, with the statement that they had not been protested because the maker expected to pay them from day to day. The New Albany bank had no notice of the state of affairs until June 14th, or eight days after the Bedford bank had failed, and only twenty days before the stone quarries company failed. At the time of the transaction a great panic was on the verge of sweeping over the country, and business men everywhere were on the alert. The bank that collects for its correspondent must use due diligence; and, while it was not negligence to send the notes to the bank of which Winstandley was cashier, although he filled the position of secretary and treasurer in the quarries company, still, when the notes were not paid or protested according to the usual course of business, the exercise of ordinary care was required of appellant, to learn what the trouble was and apprise its customer of it, especially

under the existing conditions in the financial world. In Shipsey v. Bowery Nat. Bank, 59 N. Y. 485, the plaintiff deposited a check drawn by another upon a bank at Portchester [936] with the defendant for collection, who forwarded it by mail on the same day. It should have reached Portchester on the 3d, and an answer on that day would have reached the defendant on the 4th. The check was lost. The defendant did not discover the loss until the 16th, and on the 18th it notified the plaintiff. The drawer failed on the 20th, and before another check could be forwarded. The defendant was held liable for the loss, in not discovering and notifying the plaintiff sooner of the loss of the check. In First Nat. Bank of Trinidad v. First National Bank of Denver, 4 Dill. 290, Fed. Cas. No. 4810, the check was sent for collection on January 10th, and remained good until January 29th; but the defendant made no inquiries until February 9th, and gave the plaintiff no notice of the non-payment of the draft until February 11th. The bank was held responsible, Judge Dillon saying that the decisions in England and in this country are uniform that such delay to make inquiry and omission to notify the party interested imposed a liability for the loss: See, also, 3 Am. & Eng. Ency. of Law, 2d ed., 805, and cases cited. These authorities seem to us conclusive of the case before us. It was the duty of appellant to use reasonable skill and diligence in protecting the interest of its depositor, and, in determining whether it did this, we must look to all the circumstances of the case. It was a time of great financial stress. Winstandley, whose duty it was, as cashier of the Bedford bank, to collect the note, was the treasurer of the stone company, and therefore the person whose duty it was to pay it. The sum of the matter was that Winstandley was to collect the note from himself, While a bank, in forwarding paper for collection to its correspondent, is not required to inquire who its officers are, before [937] sending the paper, when it does actually know that the cashier is to collect the note from himself, and the paper is not paid or heard from after maturity, in a time of financial pressure, inquiry should be made by it promptly, and notice given the depositor without unreasonable delay. On May 5th appellant should have received either the money or notice of protest of the first note. It was grossly negligent if it made no inquiries before the 13th, and, if it made such inquiries, it was equally negligent to forward the second note to the Bedford bank without an answer to its tracer.

For it was bound to know that the indorser on the first note had been released, and it should have taken reasonable steps to protect the interest of appellee.

It is urged for appellant that the pleadings are not sufficient to present this issue. It is alleged by appellee that appellant did not exercise reasonable care and diligence in collecting the note, or any care whatever, but was guilty of gross negligence in the collection thereof, and that no notice was given it of the nonpayment of the notes, or to what bank they had been sent, until June 15th; that the notes were not presented for payment, and not protested; and that by reason thereof the money was lost to appellee. Appellant denied these allegations, and pleaded affirmatively that it did exercise reasonable care and diligence throughout the transaction, and that the loss was without fault on its part. The pleadings aptly present the issue which the court tried.

It is also insisted that the finding of the court that appellant took no steps to trace the notes until June 7th is erroneous, and in support of this we are referred to the deposition of appellant's cashier, who states that the collection clerk sent a tracer before June 7th. But when this tracer [938] was sent does not appear, or what information was received in answer to it. Taken as a whole, the cashier's deposition shows that he has little real personal knowledge on this subject. If the tracer was not sent promptly after May 5th, appellant was negligent in the delay. If it was sent in a reasonable time after May 5th, it should have been answered in a day or two. If in answer to it appellant learned the true situation, or if it got no answer, it was grossly negligent in allowing the matter to run along as it was without any steps to protect appellee's interest or notice to it, and in sending meanwhile the second note to the same person for collection.

Judgment affirmed.

The Liability of Banks in the matter of collections where they forward the paper to another bank is discussed in the monographic notes to Minneapolis etc. Co. v. Metropolitan Bank, 77 Am. St. Rep. 623-627; Allen v. Merchants' Bank, 34 Am. Dec. 313-317. It is held in Carson etc. Co. v. Fincher, 129 Mich. 687, 95 Am. St. Rep. 449, 89 N. W. 570, that the bank upon which a check is drawn is not a suitable subagent for its collection to be selected by the bank with whom the check has been deposited for collection.

BOARD OF COUNCIL OF FRANKFORT v. DEPOSIT BANK.

[111 Ky. 950, 65 S. W. 10.]

REVERSAL OF JUDGMENT—Res Judicata of Decree Based upon.—If a federal court holds the judgment of a state court, dismissing an action against a bank for taxes for the years 1893 and 1894, to be a bar to the recovery of taxes against it for subsequent years, and enjoins their collection for such years, but the judgment of the state court is thereafter reversed, the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. (p. 446.)

T. H. Crocket, J. W. Rodman, Ira Julian and W. H. Julian, for the appellant.

Frank Chinn and D. W. Lindsey, for the appellee.

950 PAYNTER, C. J. By this action the city of Frankfort seeks to recover taxes due for the years 1893 and 1894. It was filed in 1894, but no judgment was rendered until February, 1896, which sustained the appellee's defense that it had an irrevocable contract under the "Hewitt Law," which gave it immunity from municipal taxation, the court following the opinion of this court delivered in June, 1895: Board of Council v. Deposit Bank, 31 S. W. 1013. Subsequently, this court (17 Ky. Law Rep. 245, 39 S. W. 1030) overruled its opinion, and under the latter 951 opinion the appellee was liable for the taxes in question. An appeal was prosecuted from the judgment of February, 1896, to this court, which was reversed: Board of Council v. Deposit Bank, 108 Ky. 766, 22 Ky. Law Rep. 466, 1384, 57 S. W. 787, 60 S. W. 19. Under the opinion of this court and the response to the petition for rehearing, all questions are eliminated from the case except the question as to whether the right to recover the taxes for the years in question is barred by a judgment of the federal court in the proceeding wherein the appellee sought to and had enjoined in that court the collection of taxes due the city of Frankfort for the years 1895, 1896, 1897, and 1898. The federal court held that the appellee had no contract rights with the state which relieved it from the payment of taxes to the city of Frankfort for the years last mentioned, but that by reason of the unreversed judgment of the Franklin circuit court, to which we have referred, rendered in February, 1896, in this case, the appellant was barred from

recovering the taxes for the years mentioned. That opinion was delivered before this court reversed the judgment. In the opinion reversing that judgment this court held that the defenses previously interposed were not good. The appellee thereupon filed an amended answer, in which it pleaded the judgment of the federal court as to the taxes for the years 1895, 1896, 1897, and 1898 as a bar to the appellant's right to recover for the years 1893 and 1894, which were sought to be recovered in this action. So we have this anomalous condition: The supreme court of the United States holding in the case mentioned that the appellee had no contract rights which gave it immunity from taxation to the city of Frankfort, but that it was protected against the enforcement of the taxes for the years stated by reason of the unreversed judgment to which we have alluded. The same effect must be given [952] to the judgment of a federal court as an estoppel as if it were the judgment of a state court. The judgment having been reversed, the foundation upon which the federal court's judgment was based has been swept away by the opinion of this court. Had it been reversed previous to the judgment of the federal court, then, of course, that court would not have held the city was estopped by the judgment from asserting its claim for the taxes for the years there in controversy. It would certainly be against reason and the doctrine of estoppel by judgment for this court to now hold that the judgment of the federal court is a bar to a recovery in this action. It is not necessary for this court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the federal court proceeding. However, we do hold that the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. This court, in City of Newport v. Commonwealth, 106 Ky. 434, 21 Ky. Law Rep. 42, 50 S. W. 845, 51 S. W. 433, and Louisville Bridge Co. v. City of Louisville, 22 Ky. Law Rep. 703, 58 S. W. 598, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes.

It is insisted by counsel for appellee that the federal court not only held that the judgment of the Franklin circuit court in this case was a bar to a recovery for taxes for the years 1895, 1896, 1897, and 1898, but also a bar to the right of the city to assert a claim for taxes for other years, as the judgment of the circuit court sustained the claim of the appellee that it had an irrevocable contract under the Hewitt law. This position might be taken with some plausibility under recent rulings of the

supreme court of the United States if the judgment in 953 question had remained unreversed. It has not only been reversed, but this court and the supreme court of the United States held that the bank did not have an irrevocable contract under the Hewitt law. The rule of the supreme court with reference to the effect of such adjudications certainly could not apply to this case when the judgment which was the basis of its opinion is no longer in force. Should we sustain such a claim, we would, in effect, allow the judgment that has been reversed to be pleaded as a bar to the cause of action alleged in the petition, and held to be good in the opinion removing the judgment.

Counsel for appellee argues that as the then unreversed judgment of the Franklin circuit court in this case was held by the federal court to be a bar to the right to collect taxes for the years there in question, the judgment of the federal court is a bar to the right of the city to collect taxes for the years here in question, although the judgment held to be a bar has since been reversed by this court. A mere statement of the argument carries its refutation. The most that could be said as to the federal court's judgment is that it, though based upon an erroneous judgment subsequently reversed, is a bar to the recovery for the taxes for the years there in question. Certainly, the judgment of the Franklin circuit court could operate as a bar to the city's rights only so long as it remained in force. The judgment of the federal court could not and did not prevent this court from reversing it. When reversed, it is not available in this court or the federal court as a bar to the rights of the city to collect the taxes here claimed.

It follows that the judgment of the circuit court must be reversed for proceedings consistent with this opinion.

O'Rear, DuRelle, and Burnam, JJ., dissenting.

The Principal Case is cited in the recent monographic note to Cowdery v. London etc. Bank, 96 Am. St. Rep. 131, 132, on the reversal of judgments.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. PITTSBURG AND KANAWHA COAL COMPANY.

[111 Ky. 960, 64 S. W. 969.]

RAILROAD—Granting Shipper Exclusive Use of a Switch.—A contract whereby a railroad company, in consideration for a right of way for part of a switch-track, grants to a coal company the exclusive use of such track for coal purposes, is against public policy and void. (pp. 449, 450.)

RAILROAD—Use of Switch, When cannot be Prohibited.—If a railroad company, in consideration for a right of way for part of a switch-track, grants a coal company the exclusive use of such track for coal purposes, and the carrier cannot perform the contract because opposed to public policy, the coal company cannot prohibit the use of the part of the track passing through its property, when large investments by other parties are dependent upon the continued use of the switch. (p. 450.)

RAILROAD—Injunction to Furnish Cars.—A shipper is entitled to a mandatory injunction against a railroad company to furnish him cars, when it refuses to fulfill its obligations in this respect, notwithstanding his remedy at law for damages. (p. 450.)

RAILROAD—Injunction to Furnish Cars—Obstructing Street. A mandatory injunction against a railroad company to furnish a shipper cars should be refused when the cars will be stood in the center of a street for loading, and the city has not authorized such a use of the thoroughfare. (p. 451.)

Wright & Anderson and Edward W. Hines, for the appellant.

Thomas P. Carothers, for the appellee.

960 BURNAM, J. This is an application for a mandatory injunction by the Pittsburg and Kanawha Coal Company, requiring the Louisville and Nashville Railroad Company to furnish cars 961 at its elevator and yard at Eleventh and Lowell streets, in the city of Newport, for the transportation of coal. The petition alleges that the Pittsburg and Kanawha Coal Company is a corporation under the laws of this state, engaged in the business of buying and selling coal, stone, sand, and other commodities at its coal elevator and warehouse at the northwest corner of Lowell and Eleventh streets; that the railway company is the owner and operates a switch-track leading from a point outside the corporate limits of Newport, on its main track, near a place called Finchtown, on the Licking river, and thence along Lowell street, to the property of the Newport Rolling Mill Company; that the railroad company uses this switch-track for the purpose of hauling freight to and from the place of business of

various factories located on Lowell street to its main line, but that they have refused to deliver to them empty cars for the purpose of being loaded with coal, and have refused to haul from their place of business cars loaded with coal; that their elevator and warehouse are so located, as to the track of the defendant company on Lowell street, that cars can be easily loaded and moved, without injury or inconvenience to other merchants and shippers on the line of said track, and that defendants, S. F. Dana & Co. and the Campbell Creek Coal Company, are also engaged in the business of buying and selling coal; that their elevator and yards are located on the line of the defendant's switch, nearer to their main line and south of the corporation line of the city of Newport; that the railroad switch passes through their property, and that the railroad company, in consideration that no charge was made therefor, had agreed with the Campbell Creek Coal Company and S. F. Dana & Co. not to haul coal over the [962] switch for any other concern; that the right of way over Lowell street was conferred upon the appellant's vendor by the city of Newport for the express purpose of facilitating the business of various large enterprises fronting on Lowell street; that by reason of this contract with the Campbell Creek Company appellee refused to transfer coal for them; and that by reason thereof they are subjected to great inconvenience, injury, and damage, and ask that the railroad company be compelled to receive and make deliveries of cars loaded with coal to them in the same manner, and on the same conditions, as it receives and delivers similar cars to other persons engaged in the same line of business. The railroad company, S. F. Dana & Co., and the Campbell Creek Coal Company filed their joint answer, and say that the Louisville and Nashville Railroad Company is not the owner of that part of the switch which lies upon and over the lands of the defendant, the Campbell Creek Coal Company, and that it was expressly stipulated and agreed in the original contract by which the railroad company obtained the right of way through the lands of the Campbell Creek Coal Company, that no coal was to be hauled from any yard, elevator, or place over that part of the track, and that any violation of such agreement would entitle the Campbell Coal Company to withdraw the privilege to maintain, use, and occupy the track over its premises. It appears from the evidence that the switch-track of the defendant was located over and along Lowell street, an unimproved street of the city of Newport on which are located a rolling-mill, brickyard, iron and

brass foundry, streetcar power-house, and other enterprises, by virtue of an ordinance of the city, and that it connects with the railroad company's main line about a quarter of a mile south of the corporate limits of Newport, and runs [963] along Lowell street about a mile, to the Newport Rolling Mills; that that part of the track between the corporate limits of Newport and the main track runs through the lands of the Campbell Coal Company and S. F. Dana & Co.; that the track was built exclusively for the accommodation of various merchants whose premises fronted on Lowell street; and that all kinds of merchandise are hauled over it except coal; this commodity is only hauled from the Dana yards, which are located very near to the main line, outside of the city limits. It further appears that most of these business establishments have "spur-tracks" connecting their business premises with the switch-tracks; that appellee's property fronts on Lowell street about one hundred and twenty feet; that they have no spur-track connecting their property with the main switch, or authority from the city to use the street for that purpose, although very capable of being so used, but proposed to load and unload cars standing upon the switch-track in the center of the street by means of wagons.

The first question to be considered is the validity of the contract between the railroad company and the coal company, giving them a monopoly of the business of shipping coal over this switch. Railroad companies are quasi public corporations, created for the purpose of exercising the functions and performing the duties of common carriers. These duties are defined by law, and in accepting their charters they necessarily took with them all the duties and liabilities annexed; and they are required to supply, to the extent of their resources, adequate facilities for the transaction of all business offered, and to deal fairly and impartially with their patrons: McCoy v. Cincinnati etc. R. R. Co. (C. C.), 13 Fed. 5; Munn v. Illinois, 94 U. S. 126. And they have no right to contract with [964] a corporation or individual to give exclusive rights to transfer any commodity over any part of their line. Appellants have by their charter the power of condemnation for right of way both for their main and switch-tracks, and their obligations to the general public forbid that they should acquire such rights of way under such circumstances and conditions as render it impossible for them to impartially serve all their customers. In our opinion, the contract with the Campbell Creek Coal Company, giving them the exclusive use of the switch for coal purposes, was against pub-

lic policy, and absolutely void. The railroad company could not, for the purpose of saving the expense of condemnation proceedings, make such a contract.

We deem it unnecessary in this proceeding to determine what may be the remedies of the Campbell Creek Coal Company growing out of the inability of the railroad company to perform its contract, but we are clearly of the opinion that they cannot, at this late day, prohibit the use of that part of the track which passes through their property, as it is evident that large pecuniary investments have been made by other parties which are dependent for their profitable operation upon the continued use of the switch-track.

The contention is made for the railroad company that appellee is not entitled to a mandatory injunction requiring them to fulfill their corporate obligations to furnish impartial service, because they have adequate relief in a court of law by suit to recover damages for the wrong done. Undoubtedly this remedy exists, but it is not the only means of relief which the law provides. By accepting its charter the railroad company assumed obligations to the public and the duty of enforcing these obligations, in the absence of some statute providing a different remedy, necessarily devolves upon courts of equity. Their jurisdiction [965] to grant relief of this sort has been well established and defined: Hays v. Pennsylvania Co. (C. C.), 12 Fed. 309; also the Express Case, decided by Justice Miller and Judge McCreary (C. C.), 10 Fed. 869; and the case of State v. Hartford etc. R. R. Co., 29 Conn. 546. It is plainly laid down in these and other cases that a railway company may be compelled by mandamus to carry out the object for which they were created, and to impartially and without discrimination serve the public.

But there is another feature presented by this case which remains to be considered. Appellee has no spur or sidetrack from Lowell street into its grounds, and seeks in this proceeding to compel the railroad company to stand the freight-cars on their track in the center of Lowell street in front of their property, and to be loaded, and it does not appear that the city has ever authorized such a use of the street. It is manifest that if appellant is required to halt cars on its track in front of appellee's place, and leave them there to be loaded and unloaded, it will materially obstruct the use of the switch-track by parties living beyond appellee's yard, and might subject appellant to prosecution by the city for unlawfully obstructing a public street and converting it into a private coal-yard. In the absence of

express authority from the city of Newport authorizing such use of the street, and conclusive testimony that it would not be prejudicial to the use of such switch by the appellant's other patrons, we think the court erred in granting the injunction.

For this reason the judgment granting the injunction is reversed, and cause remanded for proceedings consistent with this opinion.

That a Common Carrier cannot discriminate between persons applying to it for the transportation of goods, see the monographic note to Root v. Long Island R. R. Co., 11 Am. St. Rep. 647-655; Nichols v. Oregon Short Line R. R. Co., 24 Utah, 83, 91 Am. St. Rep. 778, 66 Pac. 768; and that carriers may be compelled by mandamus to perform their legal duties, see the monographic note to Potwin Place v. Topeka Ry. Co., 37 Am. St. Rep. 321; Savannah etc. Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937; Cumberland Tel. etc. Co. v. Morgan's Louisiana etc. R. R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442, 24 South. 803.

CASES

IN THE

SUPREME COURT

OF

LOUISIANA.

POTTS v. SHREVEPORT BELT RAILWAY COMPANY.

[110 La. 1, 134 South. 103.]

NEGLIGENCE, CONTRIBUTORY—Known Danger.—If a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger. (p. 455.)

NEGLIGENCE, CONTRIBUTORY.—To Engage in a Dangerous Occupation is not of itself contributory negligence. (p. 456.)

ELECTRIC CORPORATIONS—Duty to Insulate Wires.—A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work or pleasure, to prevent injury. Such company must keep its wires perfectly insulated or provide sufficient safety appliances to protect against danger from them. (pp. 456, 457.)

ELECTRIC CORPORATIONS—Duty as to Insulation of Wires.—It is the duty of an electric railroad company to use the utmost care and vigilance to keep all wires connected with its trolley perfectly insulated. It is its duty to know of any dangerous defect in or along its line arising from imperfect insulation and to immediately remedy such defect, and the fact that frequent inspections of the line were made to ascertain the conditions of the wires and to remedy defective insulation, does not relieve the company from liability. (pp. 457, 458.)

Wise & Herndon, for the appellant.

J. H. Shepherd and Alexander & Wilkinson, for the appellee.

2 BLANCHARD, J. Plaintiff sues as the surviving widow of George Potts. Her action is one sounding in damages on account of his death, which she charges to the negligence and

omission of duty of the defendant corporation. She asked judgment for twenty-five thousand dollars.

[3] The jury that sat upon the case returned a verdict for five thousand dollars, and from the judgment based thereon defendant appeals. Her husband was twenty-seven years of age when he met his death and she had been married to him only about eight months. When killed he was foreman of a line gang operating for the Cumberland Telephone Company at Shreveport, Louisiana, and engaged at the time in stringing wires. He was earning a salary of sixty-five dollars per month.

Under a franchise granted by the city of Shreveport defendant company operates a double track electric street railway on Texas avenue in said city. It is the overhead trolley system. There is a trolley wire over each track. They are suspended by wires spanning the street and these are called span wires. These span wires are attached to wooden poles placed opposite each other on the two sides of the street. The trolley wires are made fast to the span wires by means of what are called "hangers" or "ears." The latter name is given them, supposedly, because in shape and appearance they somewhat resemble an ear.

These hangers or ears are insulated, the purpose being to confine the current of electricity, which propels the cars, to the trolley wire. Were it otherwise each span wire would be a "live" or "hot" wire, charged with the same voltage of electricity that the trolley wire is. This would result in so much leakage of the electrical current as to impair its efficiency in the work of operating the cars, and would, besides, render each span wire dangerous.

The Cumberland Telephone Company, also under a franchise from the city, occupies the sides of Texas avenue with its poles and wire. On cross-arms attached to its poles it maintains and operates numerous wires on and along the street. The electrical current with which telephone wires are charged is too weak to be dangerous to human life. But the current with which the trolley of the car company is charged is of deadly potency.

Potts, the dead man, was the employé of the telephone company—not of the car company. His death was occasioned by the telephone wire he was stringing coming in contact [4] with a span wire of the car company. This span wire, notwithstanding its connection with the trolley wire, should have been, through proper insulation, harmless. But it was not. It was

deadly dangerous. The insulation at the hanger or ear was gone, if it had ever existed, and the wire was alive with, likely, the same voltage of electricity as was passing over the trolley. This being so the instant the telephone wire touched it—one end of the wire being on the ground thus completing the circuit—it (the telephone wire) became likewise charged with the deadly current. Potts, at the time, had hold of the wire he was stringing. It was the wire that came in contact with the span wire. The current was thus communicated to him and the shock killed him instantly.

The petition charges negligence in defendant in exposing its wires without insulation or protection at a point or place where it was known plaintiff's husband and others would be required to work and be exposed to contact therewith. The answer is a general denial, coupled with a plea of contributory negligence on part of the deceased.

The contention of the plaintiff is that, to the absence of insulation protecting the span wire from inoculation by the current of electricity the trolley wire was conveying, is the death of her husband immediately attributable; that the proximate cause of his death was the condition of this span wire—heavily charged with electricity; that it was the duty of defendant to prevent this, and as a safeguard against possible defective insulation it was its further duty to provide guard wires over each span wire; that had guard wires been so placed the telephone wire would not have come in contact with the span wire and her husband would not have met with untimely and violent death.

The contention of the defendant is that the dead man was an experienced and skilled electrician and lineman and was well aware of the perils incident to the handling of wires in the city of Shreveport; that he had knowledge of the fact that the span wire in question was a live wire and knowing this should have declined service at that point until it was made harmless by insulation, or else going on with his work, should have taken the precautions necessary to shield himself from harm; that there were various means by which he could have protected himself from contact with the dangerous wire, none of which he resorted to; and that, failing in this, was guilty of that degree of carelessness and neglect which bars recovery.

In stringing the telephone wire Potts had with him two assistants, Whitworth and Holt. He was up on the pole to which

the wire was to be strung. In close proximity was the span wire in question. That it was heavily charged with electricity there is no doubt. The death of Potts attests this fact. That it was so charged is due to the fact that it had no insulation to protect it from the trolley wire. The testimony leaves no doubt whatever of this.

The wire Potts was stringing had been passed over the span wire. This had been accomplished by means of a rope. Whitworth was westward of the pole Potts was on. Under instructions from Potts he was pulling the wire which was being strung. This pulling of the wire kept it taut, and while taut it was free from contact with the span wire. But Whitworth stumbled and this circumstance caused a slackening of the wire. This slackening brought it in contact with the span wire and immediately it became charged wth the deadly current. So deadly was this current that when Potts was shocked and hung suspended, Whitworth, rushing up to the end of the wire touching the ground in the generous effort to pull it away from Potts, seized it and was himself instantly killed.

One witness (Clanton), called by the defense, testifies the telephone wire came in direct contact with the trolley wire, leaving the inference that it got its charge of electricity from the trolley. But the great preponderance of testimony is that it rested not against the trolley wire, but on the span wire, about half way from the pole to the trolley.

It is true, Potts was aware the span wire near him was a "hot" wire, but to what extent it was charged with the electrical current he did not know. The fact that he knew there was, at that point, leakage from the trolley wire to the span wire, and yet continued working there, was not, of itself, negligence barring recovery: [6] Beach on Contributory Negligence, 2d ed., 44, 50. He could still work there notwithstanding knowledge of the hot span wire, and would not be chargeable with negligence unless he failed to take due precaution and exercise due care to shield himself from harm.

This is not a case of a master furnishing defective appliances to do his work and which the servant, knowing the defect and danger, proceeded, notwithstanding, to do the work, thus assuming the risk. Potts was not the servant of the car company and it was the latter's span wire that did the mischief.

In Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, this court held that when

a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger.

It is not contributory negligence to engage in a dangerous occupation. Such was the ruling of this court in Myhan v. Louisiana Electric Light and Power Co., 41 La. Ann. 969, 17 Am. St. Rep. 436, 6 South. 799. See, also, Beach on Contributory Negligence, 370; Wood on Master and Servant, 763.

It did not appear to the satisfaction of the jury that Potts had unnecessarily exposed himself to the existing danger in executing the work he was called on by his employers, the telephone company, to do. It did not appear to them that he had failed to take due precaution to shield himself from danger.

In this we are not prepared to say the jury erred. Potts had the necessary assistance to enable him to do the work he was engaged in with safety to himself and them. But for the unforeseen occurrence of Whitworth stumbling and letting the wire slack, the accident would not have happened. Potts was keeping himself "in the clear"—that is, from contact with the dangerous circuit. He was doing this by keeping the wire he was holding off the dangerous span wire. So long as his assistant did not stumble he was safe, and because he could not and did not foresee that his assistant would stumble, he is not chargeable with contributory negligence.

Nor is it a case where the principle involved in "the fellow-servant doctrine" may be invoked. Whitworth was his fellow-servant in the telephone company's employ, but neither of them was the servant of the car company to whose benefit the doctrine would inure, if applicable. The appliance (the span wire) which caused the harm was the property of the car company and the danger arising from it was due to the neglect of the latter. The prime cause of Potts' death was not Whitworth's stumble. It was the "live" span wire of defendant company. Had that wire been a "dead" one in the sense that it was not charged with electrical current, the stumble of Whitworth would not have resulted in his death.

A company maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go either for work or pleasure, to prevent injury. It is the duty of the company under such conditions to keep its wires perfectly insulated, and it must exercise the utmost care to maintain

them in this condition at such places: Joyce on Electrical Law, secs. 445, 517.

And a company maintaining such wires must see to it that their lines are safe for those who by their occupation are brought in close proximity to them: Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51; Overall v. Louisville Electric Light Co. 20 Ky. Law Rep. 759, 47 S. W. 442; Brown v. Edison etc. Illuminating Co., 90 Md. 638, 78 Am. St. Rep. 442, 45 Atl. 182.

In the instant case the fact of the span wire being heavily charged by leakage from the trolley wire subjected the workman to greater risks than those which fairly belong to the employment he was engaged in: Myhan v. Louisiana Electric Light etc. Co., 41 La. Ann. 969, 17 Am. St. Rep. 436, 6 South. 799. For this defendant must be held liable under the circumstances disclosed. The live span wire was the proximate cause of Potts' death. It ought to have been a harmless wire and would have been with proper insulation.

It was the duty of defendant company to have ascertained the unsafe and dangerous condition of its span wire at that point and [8] to have remedied the same. The fact that frequent inspections of the line were made to ascertain the condition of the wires and to remedy defective insulation does not relieve the company of liability. If the span wire had become dangerously charged with the electrical current the company's inspection should have been thorough enough to have detected it.

Using an agency of such subtle and dangerous power as electricity, the burden of the utmost care and vigilance to keep all wires connected with the trolley perfectly insulated was upon the company. It was its business to know the span wire in question was a "live" wire through leakage from the trolley which it suspended.

"The knowledge which they ought to have had," said this court in Myhan v. Louisiana Electric Light etc. Co, 41 La. Ann. 968, 17 Am. St. Rep. 436, 6 South. 799, "the law presumes, juris et de jure, they had."

And in that case it was further said that even had the company's representatives sworn they did know of the dangerous condition of the wires such ignorance would not have exculpated them; that a superior is presumed to know, and in law knows, that which it is his duty to know, viz., whatever may

endanger the person and life of his employé in the discharge of his duties.

These observations of the court in the Myhan case apply with more force here by reason of the fact that Potts (the man killed) sustained no contractual relation with defendant company. He was not in its employ. He was the servant of the telephone company, which had the right to be upon the street with its poles and wires and servants in the lawful and legitimate pursuit of its business.

Defendant company knew that the employés of the telephone company must needs be in the street and on the poles and among the wires in the discharge of their duties. It knew that wires for the telephone service were constantly being strung, and since there was joint occupancy of the street by the two companies with their poles and wires and servants, it was all the more incumbent upon that one of the companies whose wires carried the deadly current to see to it that its transmission was effected with safety to all concerned.

[9] It requires a powerful voltage of electricity to propel street-cars. The agent for the transmission of this power is the trolley wire. The current should be kept confined to it. Had this been done and the employés of the telephone company had been so careless as to get the wires they were stringing mixed up with the trolley wire and injury or death resulted, there could be no recovery.

But it is different as regards the span wires suspending the trolley. It is the duty of the car company to keep these immune from electrical contagion, free from dangerous and deadly electrical energy. The telephone wires being strung over the span wires are liable to come in contact with them no matter how careful those engaged in stringing such wires may be. And where they do come in contact it should be a harmless contact and would be a harmless one were the span wires kept free from the electrical current.

Such is intended to be and should be their usual condition. When it is otherwise and injury or death ensues to those who have not accepted such risks, owners of the offending wire must stand the responsibility.

It is in evidence that the primary object of car companies in insulating their span wires is to confine the electrical energy to the trolley, to prevent its escape by leakage, and thus keep unimpaired the efficiency of the power which drives the cars. But courts of justice will not consider this the primary ob-

ject of such insulation where danger to human life lurks in span wires. They will consider the primary object of the insulation to be to obviate such danger, and the efficient propulsion of the cars a secondary object.

Judgment affirmed.

Persons Using Electric Wires are bound to know the extent of the danger arising from them, and to use the very highest degree of care practicable to avoid injury to everyone who lawfully may be in proximity to them and likely to come accidentally in contact with them. The duty is not only to make the wires safe by proper insulation, but also to keep them so by constant oversight and repair: Fitzgerald v. Edison Elec. etc. Co., 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732, and cases cited in the cross-reference note thereto. It has been held, however, that this duty does not extend to a trespasser: McCaughna v. Owosso etc. Elec. Co., 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73.

STATE v. HAMMOND PACKING COMPANY.

[110 La. 180, 34 South. 368.]

CONSTITUTIONAL LAW—Contemporaneous Statutes—Construction.—If a general and special law are enacted at the same time and the provisions of both relate to the same general subject and can stand together without irreconcilable conflict, the general law does not repeal the special, but both are operative. (p. 462.)

CORPORATIONS, FOREIGN.—The State may Deny foreign corporations the right to transact business, hold property or exercise any corporate function within its limits. (p. 463.)

CONSTITUTIONAL LAW—Right to Classify and Tax Foreign Corporations.—The state has a right to classify foreign corporations doing business within it in a separate class and to tax them more and on a different basis from domestic corporations, and in so doing the former are not denied the equal protection of the law. (p. 464.)

CONSTITUTIONAL LAW — License Taxes. — Constitutional provisons relating to equality of taxation are not generally applicable to license taxes. (p. 465.)

CONSTITUTIONAL LAW.—Corporations, either foreign or domestic, are not entitled to the privileges of citizens in a constitutional sense, save in the matter of jurisdiction to enable them to appear in the courts. (p. 465.)

INTERSTATE COMMERCE—License Tax on Foreign Corporations.—The state has the right to regulate its interstate commerce, and a license imposed on a forein corporation for the privilege of doing business within its limits is not a regulation of commerce especially as to a business exclusively local in character. (pp. 467, 468.)

H. C. Cage, for the appellants.

Pierson & Pierson, for the appellee.

[181] BREAUX, J. Plaintiff demands of the defendant the payment of a license; also fee of attorney, and interest for the years 1899, 1900, and 1901, respectively.

The demand is made under Acts of 1898, page 192, No. 127, approved July 13, 1898, being a statute (under article 242 of the constitution) "to levy an annual license tax upon certain classes of corporations doing business within the state, whose domiciles are in other states or foreign countries."

The section 8 of the statute which the tax collector seeks to enforce provides: "That all associations, corporations, or companies outside of this state, who directly or through an agent or representative deal in fresh meats, cured, salted, or smoked meats, or canned meats, shall pay an annual license of two dollars for each one thousand dollars of proceeds from all business done in this state."

The defendant pursues the business of wholesale dealer in salted, dried, smoked, and canned meats since the year 1894. Its [182] customers are in Louisiana and adjacent states. Its principal place of business and domicile is in Indiana. It has an agent in Louisiana, and it has complied with the laws of the state requiring corporations whose domiciles are not in this state to appoint a resident agent upon whom persons may have process served.

The defendant has paid all its licenses to the state to 1902, under Acts of 1898, page 387, No. 171, on an assessment of fifty dollars per annum upon its annual gross receipts. We have seen that plaintiff claims licenses under Acts of 1898, page 192, No. 127. Defendant's contention is that this statute has been repealed by Act No. 171, page 387, of the same session.

The first ground of dispute between plaintiff and defendant grows out of defendant's contention that Acts of 1898, page 387, No. 171, approved July 14, 1898, supersedes and impliedly repeals Act No. 127, page 192, of the same session, approved July 13, 1898.

Manifestly, it was not the legislative will to repeal Act No. 127, page 192, in question. The member who introduced Act No. 127 introduced at the same time Act No. 171. They were both referred to the same committee, and were reported back to the general assembly on the same day. They were adopted in the House and Senate as companion bills, and were sent up on the

same day to the chief executive for his approval. We have seen that Act No. 127 was approved by the executive on one day and Act No. 171 on the next.

Nothing gives rise to the inference that it was the intention of the chief executive, in approving them on different days, to let one have precedence of the other, and thereby to let his approval have the effect of repealing Act No. 127.

We readily grant that the legislative intent is not always controlling. The law-making power may stumble, and unintentionally repeal the act it intended to enact. An act passed at the same time may be repugnant to another, and it may be thereby repealed. The words must be given the meaning they usually convey, regardless of the intention, when the intention is at right angle with the language used.

As, for instance, there may be irreconcilable conflict between sections (or part of the [183] same statute), and a fortiori, between statutes: Sedgwick on Statutory and Constitutional Law, 2d ed., 105.

We are particular upon the subject of statutes enacted at the same time, because counsel at bar for the state dwelt upon the legislative intent as entitled to controlling weight. We do not agree with that view for reason before mentioned. We will add here, however, that statutes adopted at the same time are usually deemed less likely to conflict: Sutherland on Statutory Construction, secs. 151, 153.

In the present case we have not found that there is variance between the intention of the legislature and the words used to convey that intention.

The following are our reasons for holding that these Acts Nos. 127 and 171 are not, in a legal sense, conflicting: The provision of Act No. 127 was adopted in accordance with the mandate of the organic law expressed in article 242, which ordains that corporations domiciled out of the state, carrying on business in the state, may be licensed differently from home corporations.

This was a special enabling act, relating to a special class created by the text of the article of the constitution before cited. Corporations domiciled out of the state carrying on business here are distinguished from home corporations. The legislature has followed this up by enacting a special law relating to foreign corporations. But, on the other hand, Act No. 171 in question is a general license law, to which all corporations are

subject, except foreign corporations carrying on business here whose domicile is out of the state.

The section pleaded by defendant as a repealing section, viz., 6 of Acts of 1898, page 393, No. 171, when considered with reference to the whole text of that statute and with Act No. 127, may well be interpreted to read as follows, viz.: That every wholesale mercantile business, not included within the terms of Act. No. 127, is to be licensed as set forth in the Act No. 171. To our best thinking, the rules of interpretation sustain that view, for the general intention here in Act No. 171 is not incompatible with the particular intention in Act No. 127. The provisions of both acts can stand together, one relating to foreign, and the other to home, corporations.

184 "In order to be considered repealed, the special act must conflict with the general act": Sutherland on Statutory Construction, sec. 153. In the case in hand we have not found an irreconcilable conflict between the two acts.

"The general law can have full effect beyond the scope of the special law, and, by allowing the latter to operate according to its special aim, the two acts can stand together": Sutherland on Statutory Construction, sec. 158.

Again: "Unless there is plain indication of an intent that the general act shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly": Sutherland on Statutory Construction, sec. 158.

A painstaking analysis of the two acts has not resulted in our finding unavoidable repugnancy between them. The words "for every wholesale mercantile business," to copy from Act No. 171, section 6, can be restrained and modified under the text so as not to conflict with Act No. 127.

The following are well-known rules of interpretation, which have some application, viz.: "Repeals by implication are not favored." "But though it is thus clearly settled that statutes may be repealed by implication, and without express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together": Sedgwick on Statutory and Constitutional Law, 105.

It has been declared that one act of the general assembly is held to repeal another by implication only in cases of very strong "repugnancy or irreconcilable inconsistency": Sedgwick on Statutory and Constitutional Law, 105.

The charge of unlawful discrimination in favor of home corporations—another issue urged by defendant—seeks to find its support mainly in the fourteenth amendment of the constitution of the United States. Our answer to this is that licenses have been divided into classes in this state since the year 1879.

Professions, trades, and other occupations have been grouped in accordance with special legislation. The original grouping has been retouched, and the legislature has transferred interests or business from one group to another. Other business and interests have been added as subject to license [185] under the particular group in which they are placed. Complaints have been heard from license payers on the ground of inequality.

Courts, for good reason, have not been hasty to set aside the levy of license on the ground that the law imposed greater burden on one branch of industry than on another, unless in the case of illegality, or downright wrong from a legal point of view, interference with the enforcement of the law in this respect would scarcely be justifiable.

The organic law of 1879 (article 217) contained the article regarding license taxes of foreign corporations, which was reinserted in the organic law of 1898 (article 242). It remained dormant in the organic law, but nothing was done toward its execution under the constitution of 1879. In 1898, after the constitutional convention had adjourned, the legislature took up the subject, and the result was that the act complained of by defendant became a law.

With the reason or policy of the legislature, whether wise or unwise, we have little to do. Whether it was because foreign companies may have less burden here than the home corporations, whose whole stock in trade and other property is exposed to the eye of the assessor or collector, or whether other reasons prevailed, we will not discuss at any great length.

We propose to deal with the authority of the law-making power to license and tax corporations out of the state, but doing business in the state, in a different group from those in which home corporations are classed, and right of the state to levy a larger amount from foreign corporations than exacted of home corporations.

We will state preliminarily that which no one will seriously deny—that a corporation domiciled out of the state may be prohibited from carrying on business in this state. Unquestionably, other states than the state of the company's domicile may prevent them from doing business within their territory.

In Paul v. Virginia, 8 Wall. 177, the complaint was that in the state of Virginia decided preference was shown to the home companies, to the extent that the law conflicted with the constitutional provision of the United States government, which provides that "the citizens of each state shall be entitled to all the privileges and immunities [186] of citizens in the several states," and that upon Congress "was conferred the power to regulate commerce with foreign nations and among the several states."

The court in that case decided that corporations must dwell in the place of their creation, and cannot, as a matter of absolute right, move to another sovereignty. The whole matter rests with the state. It may absolutely exclude the corporation organized in another state. This decision was strongly affirmed in Ducat v. Chicago, 10 Wall. 415. This reaffirmance was made after the "fourteenth amendment" of 1868 had been adopted.

Again, in another well-considered case it was held: "The state may deny foreign corporations the right to transact their business, hold property, or exercise any corporate function within its limits": Oliver v. Liverpool etc. Ins. Co., 100 Mass. 538. It does seem that, having the right to exclude, the state has the right to classify, these corporations in a separate class, and tax them then on a different basis from other companies.

With reference to classification in matter of licenses, separate classification, under the Acts of 1898, page 192, No. 127, is authorized by no less an authority than the constitution itself, which is the solemn compact between the people and those by whom the laws are executed and administered; a sovereign grant of charter, which is not to be considered null in any particular unless on ground most cogent and convincing.

In classifying these corporations, the state has not withdrawn the protection of her laws from the companies—a right protected by the fourteenth amendment. She has only imposed a condition regarding license taxes, which is not prohibited by the fourteenth amendment.

The supreme court of the United States held as follows: "We think that we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation": Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 237, 10 Sup. Ct. Rep. 535. And our court has repeatedly decided that equality in license is impracticable.

The supreme court of the United States has properly, as we

think, sought by its utterances [187] to impress the view that taxes imposed for revenue should be equal, and that there should be no discrimination. The court, however, has not laid down that principle in matter of license taxation, and has not decided that provisions for equality are applicable to license tax.

As relates to the asserted violation of the fourteenth amendment because defendant corporation has the right of a citizen, we deem it sufficient answer to hold that corporations are not entitled to the privilege of citizens, save in the matter of jurisdiction to enable them to appear in the courts.

This is the view expressed in a number of well-considered cases, notably in Paul v. Virginia, 8 Wall. 177 (on another point), in which the court said corporations are not citizens in the sense the word is used in the constitution of the United States, except for the purpose of maintaining jurisdiction.

For the sake of some brevity upon the subject, we quote from the syllabus in Bank of Augusta v. Earle, 13 Pet. 519: "Though all the corporations are citizens of the state which created the corporation, the artificial being created by the charter cannot claim the right of the corporators as citizens of the United States to make contracts in other states."

"License may be imposed as to a matter of regulation; it may be levied for income; it may be exacted in order to confer exclusive right and establish monopoly; it may be laid on for the purpose of bringing on prohibition": Cooley on Taxation, verbo "License." The monopoly feature mentioned by this commentator does not recommend itself under a free government, and is only mentioned because referred to by this commentator. The other purposes—regulation, revenue, prohibition—are sanctioned by the law under varying conditions.

We will not stop to discuss the policy or impolicy of the purposes just mentioned. They are admissible, and left in great measure to legislative discretion. It is not for us to decide whether the license was intended to carry out or enforce one or the other of these different purposes in the present case, as it is a matter within legislative discretion.

Able counsel for defendant cites Connolly v. Union Sewer Pipe Co., 184 U. S. 558, 561, 22 Sup. Ct. Rep. 431, and Cotting [188] v. Kansas City Stockyards Co., 183 U. S. 79, 22 Sup. Ct. Rep. 30, with great confidence. We have carefully read them. In the first of these cases the Union Sewer Pipe Company, an Ohio corporation, brought its action against a

citizen of Illinois on notes given him on account of his purchase of sewer pipes from the plaintiff.

He conceived the novel idea of defending himself on the ground that plaintiff could not recover because its general business was carried on in violation of a public statute directed against trusts and monopolies. This defense he urged in place of paying a quid pro quo for his pipes.

The court did not lend its approval to the plan adopted to escape from the payment of his indebtedness. The court held that the act invoked to escape payment did not declare illegal and void any sale made by combination of firms in business or its agents.

In the second place, in reference to the interstate commerce act invoked by defendant, the court held that the property was not at the time in the course of transportation from one state to another; that the buyer could not avoid payment by pleading the asserted violated statute against trust and combination. The cited case on the point sustains our view. We will take up this point in a moment.

In the second case cited above (the Cotting case) two citizens of Massachusetts, natural persons, became vigorous as litigants, and leveled their attacks against the Kansas City Stockyards Company and against the state of Kansas, through its attorney general. These citizens, plaintiffs in the action, were stockholders of this company. Their main purpose was to have decided illegal an "act defining what shall constitute public stockyards."

The main question was, Has the state the power to reduce the charges of the stockyard companies? It seems that this statute assumed to regulate a corporation, and that one company which did much business was regulated, while another doing less was not regulated. This was the issue. The court held that the statute of Kansas was in violation of the fourteenth amendment. The decision is elaborate, and contains a clear and interesting résumé of a number of decisions. [189] One of these decisions (cited in the Cotting case) lays down the following on the subject of uniformity, bearing on the issues here.

Defendant in our case, it will be borne in mind, complains of the lack of uniformity in the license on foreign corporations upon this point. Upon this point we quote from the decision on that subject: "But this lack of uniformity in the result furnishes no ground of complaint under the federal con-

stitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government; but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the federal constitution": Merchants' Bank v. Pennsylvania, 167 U. S. 461, 463, 17 Sup. Ct. Rep. 829, cited in Cotting v. Kansas City Stockyards Co., 183 U. S. 111, 22 Sup. Ct. Rep. 43.

And the decision goes on to state: "So, again, exercising the undoubted right of classification, it may often happen that some classes are subject to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon the other": Cotting v. Kansas City Stockyards Co., 183 U. S. 111, 22 Sup. Ct. Rep. 30; citing approvingly Merchants' Bank v. Pennsylvania, 167 U. S. 461-463, 17 Sup. Ct. Rep. 829.

190 We think the case here falls within the view above expressed in the decision from which we quote. It is well settled that provision for equality is not generally applicable to license tax.

The defendant, on another ground of defense, pleads the prohibition of interstate law. The case in hand does not fall within the prohibition invoked. Defendant's branch business is one established in the city of New Orleans, and carried on within the limits of this state, where, it is true, it sells to all comers without regard to state limits.

The state has the right to regulate its internal commerce, and a license for the privilege of doing business within its limits is not a regulation of commerce. There is no commerce between the state here in question. The business of the defendant in this state is exclusively local in character.

The packages offered for sale are brought here broken, and sold in the usual way of carrying on business within the state.

We have considered all the grounds urged by the defendant. No alternative is left us save to reverse the judgment. We do not think the authorities could sustain a different decree. We are pleased that, if we are in error, the supreme court of the United States can correct the error.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is avoided, annulled, and reversed.

It is further ordered, adjudged, and decreed that defendant is liable for licenses under Acts 1898, page 192, No. 127, and is condemned to pay plaintiff, first, the sum of five hundred dollars for the year 1899, less one hundred and seventy-five dollars already paid for that year; and, second, the sum of five hundred dollars for the year 1900, less twenty-five dollars license heretofore paid for that year, and five hundred dollars for the year 1901, less twenty-five dollars license paid for that year—together with two per cent per month interest on each balance from March 1st of the year for which same is due, and ten per cent attorney's fee on the whole amount, principal and interest, with recognition of the state's first mortgage and first lien and privilege on the property of defendant company.

Defendant is also condemned to pay cost of both courts.

A Foreign Corporation is not a citizen of the state in a constitutional sense. It may be permitted to do business in the state, or entirely excluded therefrom, or admitted under such limitations and conditions as the state may choose to impose, provided matters of a federal nature are not affected thereby: Anglo-American Provision Co. v. Davis Provision Company, 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608, and cases cited in the cross-reference note thereto: Cook v. Howland, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912, and cases cited in the cross-reference note thereto; State v. North American Land etc. Co., 106 La. 621, 87 Am. St. Rep. 309, 31 South. 172. Thus, a statute requiring foreign insurance companies to pay a tax on their business in the state as a condition of their doing business therein, and imposing a higher tax on them than is imposed upon domestic corporations, is not a special or local law, nor is it in violation of constitutional provisions requiring that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens: Scottish Union etc. Ins. Co. v. Herriott, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548, and see the cases cited in the cross-reference note thereto. See, too, Northwestern Ins. Co. v. Lewis and Clarke County, 28 Mont. 484, post, p. 572, 72 Pac. 982.

RUSS v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

[110 La. 588, 34 South. 697.]

BENEFIT SOCIETIES—Certificate as Contract.—A certificate of membership issued by an insurance benefit society is a contract, and can be changed only by and with the consent of both parties. (pp. 469 470.)

BENEFIT SOCIETIES—Reduction of Insurance—Consent of Members.—If a benefit society arbitrarily reduces the amount of insurance stipulated in a membership to be paid, payment of the assessments on the reduced basis cannot be construed as a consent by the member to the reduction when made under protest and with tender of the full amount due without such reduction. (p. 470.)

BENEFIT SOCIETIES—Reduction in Insurance.—A clause in a membership certificate in an insurance benefit society by which the member agrees to comply with all of the by-laws of the society then existing or thereafter adopted, does not authorize the society to reduce the amount stipulated in the certificate to be paid, without the consent of the member. (p. 471.)

O. B. & S. Sansum, for the appellant.

Dart & Kernan, for the appellees.

588 PROVOSTY, J. The defendant issued a certificate of membership to Benjamin O. L. Rayne, agreeing to pay Georgie J. Rayne, his wife, five thousand dollars upon certain conditions, all of which it is not pretended that Rayne did not comply with. Rayne died, and so did his wife, and this suit is brought on the certificate by the children and heirs of the wife.

One defense is that the plaintiffs sue as heirs of Georgiana Rayne, whereas the beneficiary under the certificate is designated in the certificate as Georgie J. Rayne, and in 589 the application for the certificate as Georgie Jackson Rayne. There can be no question that the plaintiffs are the legitimate children and heirs of their mother, and that their mother was the only wife of Benjamin O. L. Rayne. This suffices to clear away any uncertainty that might result from this variation in the name of the beneficiary, since she is further designated in the certificate as the wife of Benjamin O. L. Rayne.

Another defense is that, after issuing the certificate the American Legion of Honor adopted a by-law by which all policies of five thousand dollars issued by it should be reduced to two thousand dollars, and that this has had the effect of reducing accordingly the amount of this certificate. The simple answer to this is that the policy is a contract, and could not be

changed by one of the parties without the concurrence of the other.

It is claimed that Rayne paid the assessments after the reduction, and that this was an acquiescence in the reduction. The proof is that he protested against the reduction, and invariably with great care tendered the full amount that would have been due if the reduction had not taken place. What more could he have done as a protest against the reduction?

It is also claimed that Rayne agreed to abide by and be governed by all the by-laws of the defendant then existing or that might thereafter be adopted, and that, the reduction having been effected by means of a change in the by-laws the same is binding on Rayne under the express terms of his contract. This identical question was passed on by the supreme court of Massachusetts in the case of Newall v. Supreme Council American Legion of Honor, 181 Mass. 111, 63 N. E. 1, and by the United States circuit court of appeals for the eighth circuit (Mo.) in the case of Knight Templars' etc. Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93. Were we to discuss the question, we should merely repeat what is there said so well. The decisions are all the more satisfactory from the fact that the one is from the court of the home of the defendant, and the other from one of the national courts. Summing up the law on this point, Niblack on Benefit Societies, page 39, has the following: "By-laws cannot be permitted to destroy or amend the express provisions of 590 a contract of insurance without the consent of the member."

The cases cited by the defendant, if scrutinized, will be found not to be opposed to this. In Stohr v. San Francisco Musical Fund Soc., 82 Cal. 557, 22 Pac. 1125, and Poultney v. Bachman, Treasurer, 31 Hun, 49, and in numerous other decisions of which these are types, the plaintiff had no claim except under and by virtue of the by-laws and the right was expressly reserved "to repeal, alter, or amend" the by-laws. In the language of the court in the Stohr case: "The plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed." In the other cited cases, of which Daughtry v. Supreme Lodge of Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 South. 712, is a type, the right to forfeit the policy of a member for committing suicide is put by the court upon the ground of the inherent right of a mutual benefit association to make such "a police regulation in the

interest of the discipline and welfare of the endowment rank." It was a regulation for the conduct of the members, and the member had agreed in advance to be bound by all such regulations that might be made. Here precisely lies the point of distinction between that line of cases and the instant one. In the present case the change is not a matter of the regulation of the conduct of members, but is a change in the contract, irrespective of the conduct of the member. The principle of those cases is not to be carried over into cases like the instant one. This is clearly pointed out by the court in the Daughtry case, as appears from the following excerpt, with which we shall conclude this opinion:

"Orders like the defendant association have multiplied in recent years. They are organized for the mutual benefit of the members, taking care of the sick and afflicted in life, and providing for the family of the deceased member after death. Rules and regulations, a constitution and by-laws, are enacted for their government. Every member who joins one of these orders does so with full knowledge of its laws and usages. He is bound by the constitution and by-laws, and subjects himself to their discipline in [591] order to receive the benefits conferred by the order. There can be no law or regulation enacted after his membership that would destroy the benefit agreed to be conferred upon him by the laws and regulations in force at the time he joined the order. His contract of insurance could not be abridged or violated without his consent. But provision is made in the constitution for its amendment, and we see no reason why the members of an association of this kind cannot, like the body politic, change its laws, enact new ones, and discipline its members by police regulations.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

The Power Reserved by a Benefit Society to make changes in the rules, by-laws, and regulations of the order, warrants only reasonable variances in insurance contracts. Hence, if a member has paid assessments for a long time, contributed to meet matured obligations of a specified sum for each member, no subsequent amendment of the constitution or by-laws can change such sum to an indefinite amount, probably much less than that sum: Wurfler v. Trustees Grand Grove etc., 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433. See, too, the monographic note to Strauss v. Mutual Reserve etc. Assn., 83 Am. St. Rep. 710.

MITCHELL v. ILLINOIS CENTRAL R. R. CO.

[110 La. 630, 34 South. 714.]

RAILROADS—Negligence—"Flying-switches."—It is gross negligence on the part of a railroad company or its employés to make a "flying" or "running switch" when it is practicable to avoid it, and the switch can be made in another and safer way. (p. 477.)

NEGLIGENCE, CONTRIBUTORY—Care Required of Boy.—While a boy twelve years of age may be guilty of contributory negligence which will bar recovery, yet he cannot be held to the same degree of care, prudence, and circumspection required of an older or full-grown person. (p. 478.)

RAILROADS—Negligence—Unusual Dangers.—If a railway company is engaged in the performance of an extrahazardous undertaking without using proper precautions to safeguard the public, the case must be distinguished from one where a person is injured by his failure to observe necessary precautions against the ordinary and usual dangers to be anticipated. (p. 479.)

RAILROADS—Negligence—Duty to Give Warning.—If a railroad company has stationed a flagman at a public crossing for the purpose of warning persons about to cross its tracks, the public have a right to rely upon a reasonable performance of that duty by such flagman, and, upon his failure to perform it, the railroad company is liable for any injury resulting therefrom. (p. 479.)

H. C. Leake, B. E. Kemp and J. M. Dickinson, for the appellant.

S. D. Ellis and B. M. Miller, for the appellee.

631 BLANCHARD, J. This case is here on appeal by defendant from a judgment against it for three thousand dollars in favor of the plaintiff, who sued in her capacity as tutrix of the minor Osmer Southworth. Neither party asked for a jury in the court below. The trial was had before the district judge and the cause was submitted to him, without argument, on the evidence adduced.

Osmer Southworth was a boy of between twelve and thirteen years of age when the injury which gave rise to the suit was received. He lived in the town of Amite at the home and under the care of his tutrix, and was a youth of good training and habits and of more than ordinary intelligence. The frankness and candor of the testimony he gave in the case—his evident desire to state only the truth, without undue coloring of his side of the controversy—make a favorable impression.

Defendant railroad runs through the town of Amite. It would, perhaps, be more correct to say the town is built up on the two sides of the railway. The principal street is called

Railroad avenue and through this extends the railway track. The avenue, including the center space occupied by the tracks, is three hundred feet wide, and in it is constructed, close to the tracks, the depot.

On either side of the space where the tracks are located runs a roadway, and these roadways are, properly speaking, the street, or two streets. Fronting on these streets are business houses, stores, etc., facing toward the railroad, and farther out on the streets, after leaving the business section, are dwelling-houses. In one of these, on the east side of the railroad, about three blocks away from the depot, lived young Southworth.

The railroad runs at that point north and south. Several streets, running east and west, cross it at right angles. The depot is situated between the two most important of these lateral streets, one north of it, the other south of it. Of the two, the latter is the more important—the street where the most of the crossing is done. It was here that the youth was injured. The time was between 11 and 12 o'clock in the day about the middle of January, 1902. He had been sent from home to mail some letters at the postoffice, which was located on the east side of the avenue (his side), not far, we judge, from opposite the place where he was injured. He had instructions, after mailing the letters, to visit the priest for religious instruction. The priest lived on the west side of the avenue, and it was necessary to cross the railway tracks to reach his house.

At the point where the street crosses there are two tracks, a switch-track and the main track. A few feet south of this crossing, on the east side, another switch-track begins, extending southward. And there are still other switch-tracks along portions of the front of the town. Indeed what might be called "the yard" of the railway at Amite extends through the town, and it is in evidence that much switching of cars is done there every day, and always there are to be seen freight-cars left standing on some of the side-tracks.

At the time mentioned, the north-bound local freight train had reached Amite. On one of the sidetracks were two freight-cars which were to be added to this train. They were located on the sidetrack at a point south of the depot. This sidetrack ran up to and beyond the depot, and other freight-cars were on it, at the depot platform, being unloaded at the time.

This being the situation, the conductor of the train stopped it at a point south of where the southern end of the sidetrack

ran into the main track, and detaching the engine, and four or five cars with it, from the remaining cars of the train, he ran the detached section into the sidetrack, coupled the two freight-cars standing there, and which were to be added to the train, to the pilot (cowcatcher) of the engine and backed out again on the main track. He had determined to make what is called a flying or running switch. Making running [633] switches, it is shown, were not unusual, though there is a rule of the company forbidding the practice. Thus, Rule 528 of the Book of Rules intended for the governance of the employés of the company reads: "A running switch must not be made when practicable to avoid it; but when made great care must be taken to prevent accident."

It is in evidence that the two cars could have been gotten out of the sidetrack and on the main track and annexed to the train without the making of the running switch.

Thus, the engine, with or without cars attached, could have gone to the north end of the sidetrack, backed down southward upon the cars wanted, coupled them to the rear, pulled out again northward to the main track, and there backed down to that section of the train which had been detached and left standing upon the main track south of the depot.

But the conductor explains, and gives as the reason for not resorting to the ordinary and usual method of switching, that this would have necessitated disturbing the partially unloaded cars on the same sidetrack, which were at the depot platform; would have checked the work of unloading there going on; would have necessitated the moving of these cars; this would, likely, have caused the freight, or some of it, piled up in these cars and left insecure by being deprived of the support of that portion of the freight (boxes, packages, etc.) already unloaded, to fall, causing injury to the freight, etc.

Hence, his decision to make the running switch. This was to be accomplished in this way: The front section of the detached or divided train (consisting of the engine with four or five cars attached, and the two cars which had been pulled out of the switch at the south end and were now coupled to the front end of the engine) was sent up the main track northward to a point beyond the depot, and two hundred feet or more north of the north end of the other switch-track which came into the main track just a few feet south of the cross-street, or crossing, where the boy was injured. Having gotten up the track far enough for their purpose, the engine and rear cars

were backed southward, and this pulled in the direction the two [634] cars that were coupled to the pilot of the engine. Then, after getting these cars under good headway, the coupling pin was removed, thus detaching from the engine the two cars. With accelerated speed the engine then drew away from the two cars, which followed on after it. The switch, which connected the sidetrack, whose north end was just south of the crossing, had been opened to receive the cars and engine backing down rapidly to it, and after they had passed through it on to the sidetrack, the switch was to be closed in time to permit the two detached cars to go on down the main track to the rear section of the train standing south of the depot.

The flying switch was accomplished as described, though it appears to have been a risky proceeding. The evidence shows there was only about (say) thirty feet between the pilot of the engine and the trailing cars, just detached from it, as the engine passed into the switch. So close was "the shave," so daring the attempt, that it attracted the attention of those standing around—even of persons upon the sidewalk of the street.

It also appears that it produced some excitement among the train's crew, all of whom were watching intently what was going on, and, apparently, waiting with some anxiety the result. The crew consisted of the conductor, engineer, fireman and four brakemen. The conductor had stationed himself on the south side of the crossing near the north end of the sidetrack into which the switching of the engine and cars was to be made. One brakeman was at this switch and it was he that was to throw the switch at the proper time; another brakeman was stationed at the street crossing to keep people away while the switching was going on; another was on the pilot of the engine to uncouple the two cars; and the fourth was on the first of the advancing cars that were to be sent on down the main track in this running switch process. The engineer and fireman were in the cab of the engine, and it was the fireman who was then running the engine.

It is explained, though, that this was not unusual; that often a fireman will handle the engine, the engineer being present in the cab and, perhaps, directing things. It would seem, however, that at so important [635] a time as the making of a risky running switch the engineer himself should have been at the lever.

Just as the backing cars and engine were passing the street crossing and going into the open switch just south of the crossing young Southworth came down the street from the post-office. He was going westward on his way to visit the priest. He was moving in a fast walk, perhaps a little trot. He reached within a few feet of the main track, on which the cars were moving, just as the last cars behind the engine, and the engine itself, were backing past. He paused, watching the passing train. Within a few feet of him was the brakeman, who had been stationed there to warn people; but his face was toward the engine and moving cars; he was intently watching the performance of the flying-switch; he was not facing toward the way people on that side would approach the tracks; he was giving no warning. He had a red flag, but it was in his pocket; he was not using it.

He explains he was not there to flag cars. True, but he was there to warn people, and a red flag in his hand and the waving of it would serve to give warning. And to this might have been added and should have been added the giving of attention to those who came up to the crossing, and observing them, and, if need be, telling them of the danger of attempting to cross and warning them to look out for the two cars that were coming down following the engine. This was exactly what he was there for. But he was doing nothing of this kind. He was under the excitement incident to the attempt to make a daring flying-switch. He might just as well not have been there if he were not attending to the duties of the position.

Immediately following the passing of the engine the boy started forward to cross. He had not seen, he says, the two advancing detached cars. Nor had the brakeman there, as we have seen, looked around and given warning of them. The brakeman was not aware, even, the boy was there. Not until the boy started forward to cross did he see him. Then he called out to him to beware; not to attempt to cross; but it was too late. The boy was on the track; the cars were upon him. The brakeman caught him and saved him from being crushed to death, but not in time to save him from serious harm. His left foot was run over by the first wheel on the east side of the first car and crushed.

There is some conflict of testimony as to whether, when the brakeman called out to the boy, if he had heeded the call and stopped, the disaster would have been averted. With district

judge, who saw and heard the witnesses, we think not. The boy was within a few feet—five or six—of the track when he started forward, and was, likely, on the track when the warning came. Had this warning been given before the boy started forward, a different case for the railroad, altogether, would be presented.

We have reached the conclusion to affirm the judgment on two grounds: 1. Because the dangerous experiment of making the running switch should have been avoided—there being another and safer way—safer to the general public—of effecting the transfer of the two cars; 2. Because of the gross negligence of the brakeman, stationed at the crossing, in giving his attention to the making of the running switch rather than to those who came up to the crossing, and failing utterly to give the warning he was sent there to give. The first is remote and would not of itself suffice to fix the liability of the company; the second is direct and proximate. The two together justify the judgment appealed from.

The conductor's reasons for deciding to make the flying switch are not sufficient. With a little more pains and care and time taken, the transfer of the two cars could have been made in a way not attended with the danger incident to the method he adopted. His company had forbidden him to make running switches when practicable to avoid them. It was practicable here to avoid it.

Rorer on Railroads, volume 1, page 491, after giving a definition of the running switch says: "It is at all times and in all places an operation attended with more or less danger." Especially was it dangerous where attempted on the occasion under discussion. It had to be done over a prominent street crossing—the one most frequently used—in a town of many people and the resort of those living in the adjacent country, for it was the county seat of the parish: [637] See Curley v. Illinois Cent. R. R. Co., 40 La. Ann. 810, 6 South. 103; Hamilton v. Morgan's etc. S. S. Co., 42 La. Ann. 824, 8 South. 586; Downing v. Morgan's etc. S. S. Co., 104 La. 508, 29 South. 207. Under such circumstances the making of the running switch was gross negligence. Some authorities hold making running switches to be negligence per se: See Alabama etc. R. R. Co. v. Summers, 68 Miss. 566, 10 South. 63; French v. Taunton Branch R. R. Co., 116 Mass. 537; Delaware etc. R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Brown v. New York Cent. R. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Chicago

etc. R. R. Co. v. Garvy, 58 Ill. 83; Illinois Cent. R. R. Co. v. Baches, 55 Ill. 379.

The company's rule, heretofore referred to, required great care to be taken to avoid accident in those cases where resort to running switches was unavoidable, and in keeping with this requirement a brakeman was stationed at the crossing to give warning; but he failed to do so, as we have seen. This, then, was the equivalent to neglect of the requirement of the rule (for the brakeman's failure was the company's), and to neglect of a plain duty which existed for the benefit of the public independent of the rule.

This failure to give the warning at the crossing under the circumstances of this case, entails liability upon the company. The contention that the boy was guilty of such contributory negligence as relieves the company cannot be sustained.

It is true he could by looking to the right have seen the approaching detached cars, but not having been warned of the danger of the situation, and watching only the engine backing by, and seeing the space over the track left clear by its passage, he started across.

A boy of twelve years of age may be guilty of contributory negligence which bars his recovery. No doubt of that. But a boy of that age is not to be held to the same degree of care, prudence and circumspection which would be the case with an older person. The need for a watchman at the crossing for boys was greater than for older persons.

The case, in this respect, comes within the rule announced in Downing v. Morgan's etc. S. S. Co., 104 La. 508, 29 South. 207, where it was held that, the precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury are increased and their sufficiency is to be gauged by what is called for by the circumstances of each case. In that case, too, at page 517, 104 La. (29 South. 211), the observation of the court that the mere fact of certain railroad employés having been at a given place, where they should have been, amounted to nothing unless they performed the duties for which they were placed there, applies with force to the failure of the brakeman here to give the warnings at the crossing which he was sent there to give.

In McGovern v. New York Cent. etc. R. R. Co., 67 N. Y. 421, it was said: "In respect to contributory negligence on part of the boy, it is claimed that the evidence shows he did not look, before stepping upon the track, to the west, and that if

he had done so he would have seen the engine and the accident would not have happened. The rule which requires persons before crossing a railroad track to look to see whether trains are approaching, and that if they omit to do so and are injured by a collision, which if they had looked would have been avoided, are to be deemed guilty of negligence, is not to be applied inflexibly, and in all cases, without regard to age and circumstances. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care and circumspection in a child of tender years as in an adult."

In Western etc. R. R. Co. v. Young, 83 Ga. 512, 10 S. E. 197, it was held that due care according to its age and capacity is all that can be expected of a child of tender years. While a boy of twelve is not to be regarded as "of tender years" still he is not to be held to the same accountability in the matter of contributory negligence as a full grown person is.

A case like the present one, where a railroad company is engaged in the performance of a hazardous undertaking (one forbidden by its rules) without using proper precautions to safeguard the public, is to be differentiated from one where a person is injured by his failure to observe necessary precautions against the ordinary and usual dangers to be anticipated at a railroad crossing: See Ferguson v. Wisconsin Cent. R. R. Co., 63 Wis. 145, 23 N. 639 W. 123; Bower v. Chicago etc. Ry. Co., 61 Wis. 457, 21 N. W. 536.

It would seem that where a railroad company has stationed a flagman at a public crossing, for the purpose of warning persons about to cross its tracks, the public have the right to rely (not absolutely, perhaps, but reasonably so) upon the flagman to give proper notice and warning of danger.

Thus in Chicago etc. R. R. Co. v. Hutchinson, 120 Ill. 82, 11 N. E. 855, it was said: "This court is not prepared to say, as a matter of law, that a person approaching a railroad crossing, when there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed, whose duty it is to warn all persons of danger from moving trains, is required to look elsewhere than to the flagman. It is the duty of a flagman at a public street crossing in a populous city, which is much used by the public, to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty." The same doctrine was

announced in Chicago etc. R. R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664 29 N. E. 184, and in Chicago etc. Ry. Co. v. Wilson, 133 Ill. 55, 24 N. E. 555.

In referring to this doctrine it is not necessary for us to go any further (and we do not now do so) than to give our adhesion to it as applicable to the facts and circumstances of this case. We do not announce it as a rule general in its application in this state.

The instant case comes within the rule of Downing v. Morgan's etc. S. S. Co., 104 La. 508, 29 South. 207, in another respect. There the court rested its decision largely upon the fact that the man killed was taken by surprise by the near approach of the working train, and that the employés of the railroad company whose duty it was to keep a lookout and give warning did not do so. Here, young Southworth testifies he knew not of the approach of the detached cars, did not see them, was watching the passing engine, and considering the way open attempted the crossing—not to undertake which he had no timely warning from the brakeman stationed there for the purpose.

Judgment affirmed.

Breaux, J., dissents.

A Railroad Company has been held guilty of gross negligence in making running switches over a public crossing where travelers are constantly passing: Brown v. New York Cent. R. R., 32 N. Y. 597, 88 Am. Dec. 353. For other authorities on this question, see O'Connor v. Missouri Pac. Ry. Co., 94 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106; Florida etc. R. R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338; notes to Ormsbee v. Boston etc. R. A. Co., 51 Am. Rep. 360; Baltimore etc. R. R. Co. v. Breinig, 90 Am. Dec. 66.

One Approaching a Railroad Crossing has a right to assume that the railroad company will give reasonable, necessary, and statutory signals of coming trains: Atchison etc. R. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; Smith v. Boston etc. R. R. Co., 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290; Weller v. Chicago etc. R. R. Co., 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141. See, also, Kinyon v. Chicago etc. Ry. Co., 118 Iowa, 349, 96 Am. St. Rep. 382, 92 N. W. 40. However, he is presumed to know the danger, and must exercise his senses in the manner of an ordinarily prudent person, if he would relieve himself of the charge of contributory negligence: Passman v. West Jersey etc. R. R. Co., 68 N. J. L. 719, 96 Am. St. Rep. 573, 54 Atl. 809.

STENZEL v. PHILADELPHIA FIRE INSURANCE COMPANY.

[110 La. 1019, 35 South. 271.]

INSURANCE—Conditions—Interest of Insured.—Under a condition in a fire insurance policy that it shall be void if any change other than by the death of the insured takes place in the "interest, title or possession of the subject of the insurance," the word "interest" has the same meaning as in the legal phrase "right, title and interest," and means a proprietary or insurable interest, and not a mere sentimental interest. Such condition is not broken so long as the insured continues to be the sole owner of the property insured. (p. 484.)

INSURANCE—Conditions—Notice of Sale.—A condition in a fire insurance policy that it shall be void if, with the knowledge of the insured, notice of sale of any of the insured property shall be given by virtue of any mortgage or trust deed, has reference to extrajudicial enforcement of a mortgage by means of notice to the mortgagor, and is inoperative in a state where such mode of enforcing mortgages is not known to its law. (p. 485.)

INSURANCE—Conditions—Foreclosure Proceedings.—A condition in a fire insurance policy that it shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced against the subject of insurance, means the institution of suit or judicial proceedings for the enforcement of the mortgage, and waiver of legal delays, or other waiver of a nature to facilitate and expedite legal proceedings when begun does not of itself constitute the institution of judicial proceedings. (p. 485.)

INSURANCE—Liability for Loss—Value of Property Destroyed.—In determining the amount of liability of an insurer for a total loss under a fire insurance policy, the market value of the property destroyed does not necessarily govern. The insurer is liable for the actual cash value of the property as it stood at the time of the loss, taking into consideration the cost of rebuilding and allowing for the difference in value of the new building and the value of the old building when destroyed. (pp. 486, 487.)

Clegg & Quintero, for the appellants.

Blair & Denégre and A. H. Wilson, for the appellee.

1020 PROVOSTY, J. This suit is brought on a policy of insurance issued by the defendant company on plaintiff's dwelling and its appurtenances, which were destroyed by fire. Two creditors of plaintiff have intervened, claiming nearly the entire amount of the insurance, by virtue of mortgages they held on the property. That the debts are due, and were secured by mortgage on the property insured, is not contested.

1021 The defenses are, first, that nothing is due, because at the time of the fire the policy had become void as the result of

the accomplishment of certain conditions expressed in it; and, second, that at any rate the amount claimed is excessive, because the value of the property insured, which is all that plaintiff can be entitled to, was less than the amount demanded.

The conditions thus relied upon as having nullified the policy by their accomplishment are expressed in the policy as follows: "This entire policy shall be void . . . . if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of the insured, takes place in the interest, title or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

Defendant contends that all of these conditions were accomplished at the time of the fire, namely, that foreclosure proceedings had been commenced, that notice of sale of the property by virtue of a mortgage had been given, and that a change had taken place in the interest, title, or possession of the plaintiff.

The facts on which these contentions are based are the following: From the middle of April before the fire, which took place on the 27th of June, plaintiff had concluded he would have to sell the property to pay the mortgage debts upon it, the same debts now being demanded by the interveners; and accordingly he had employed a real estate broker to find a purchaser. The larger of the two debts, the one which plaintiff was unable to pay, and which was first in rank on the property, was to fall due on the 9th of May. When that date arrived, Mr. Tobin, agent for Mrs. Tobin, the creditor, insisted upon payment of at least the interest, threatening judicial enforcement of the mortgage in default of immediate payment. Even that much plaintiff was unable to pay, not even by the sale of some of his furniture. Plaintiff begged for time, and finally, on the 28th of May, no purchaser having yet presented, he placed the property in the hands of an auctioneer. He fixed the upset price at ten thousand dollars. [1022] On the next day, the 29th of May, he received from Mr. Tobin a peremptory notice that, unless the Tobin debt was paid by the 31st of May (that is, within three days), foreclosure proceedings would be instituted at once. This led to an agreement by which plaintiff reduced the upset price from ten thousand dollars to seven thousand dollars, and Tobin connsented to withhold proceedings until the day of the auction, the 13th of June. On the 31st of May plaintiff obtained from the insurance company a permit to leave the

vacant for thirty days. Whether before or after ob-
his permit does not appear, but about this time he
his residence from New Orleans to Covington, and
t of the house and left it vacant. His going to Coving-
in search of health, he being a very sick man—dying,
hortly after the institution of this suit.

ıction proved a disappointment. No sale was made.
ies had found that, to cover the debts and expenses, the
ce would have to be raised to seven thousand seven hun-
ars, and they had accordingly raised it; and this higher
ı not bid. Plaintiff, who had come to the city for the
returned to Covington, still begging for time, and hop-
matters might be so arranged as at any rate to let the
satisfied by the property. His plan now was that one
reditors should take the property and pay the other
Still in hope of carrying out this plan, and in order
nore time, he, in last resort, on the 25th of June, at
n, signed the following document:

"Office of Civil Sheriff, Parish of Orleans.

.RS. MARY TOBIN.
vs. } No. ——.
.N STENZEL.

"New Orleans, ———, 1903.

ıove case I accept service of demand of payment and
legal delays, consent that the writ of seizure and sale
once—and under the writ I waive service of notice of
ınd further waiving all legal delays, consent that the
be advertised for sale at once, also waive appraisement
roperty to be sold.

"(Signed) HERMAN STENZEL.

esses:

"(Signed) W. S. PALFREY.
"(Signed) JOHN F. TOBIN."

re occurred on the 27th of June, two days after the sign-
his document, and four days before the expiration of
ıncy permit. The conjunction of these [1023] dates,
connection with the other circumstances of the case,
e to suspicion of incendiarism; but nothing of that
charged, and doubtless the charge, if made, could have
ctually refuted.

· these facts, we are of opinion that there did not take
ny change in the interest, title or possession of the sub-

ject of insurance." The "interest" here meant is a legal interest; that is to say, the word "interest," as here used, has the same meaning as in the stereotyped phrase "right, title and interest." It means proprietary or insurable interest. For the history of this clause as found in standard policies, and its scope and meaning, see 13 American and English Encyclopedia of Law, pages 241, 252. Giving to the word "interest" this meaning, there had been no "change in the interest, title or possession of the subject of insurance." Plaintiff had continued to be sole and exclusive owner and possessor of the property insured, as fully and completely as theretofore. Perhaps that, with the realization of his having to let the property go for the debts, his interest in it, in the sense of his attachment to it, or of his solicitude or concern about it, underwent a change; but this would be a change in his sentimental interest, and the stipulation has no reference to such. If it had, the validity of standard policies would depend not upon the permanency of the legal relations of the assured to the property, but upon the constancy of his love and affection for it. Learned counsel would not and do not contend that such a vague and unbusiness-like meaning could be attributed to the word "interest" as used in this clause.

We are further of opinion that there was not given to plaintiff a notice of sale by virtue of a mortgage, within the meaning of the clause that the policy should be void "if notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed." This clause must be read in the light of the fact that in some states, and notably in Pennsylvania, the home of the defendant company, there is such a thing as enforcing a mortgage extrajudicially, by simply giving notice of sale, and that the policy in which this clause is found is what is known as a "Standard Policy"; that is to say, not a document drawn up specially to evidence this particular contract of insurance, [1024] but a printed form used for all the insurance written by the defendant—in fact, imposed upon the defendant by a statute of the state of its domicile. As to standard policies, see 9 American and English Encyclopedia of Law, page 222. As to enforcing mortgages by mere notice of sale, see 9 Encyclopedia of Pleading and Practice, pages 111, 114, 165, 166, 783. Bearing, then, in mind that in a number of states, and notably in the home state of defendant, mortgages may be enforced in two ways—by foreclosure proceedings, and by an an extrajudicial giving of notice of sale—we readily see what

by the stipulation, "if foreclosure proceedings be com-
ɔr notice given of the sale of any property covered by
.cy by virtue of any mortgage or trust deed." The
ıd meaning of the stipulation is then, in reality,
at the policy shall be void if the insured confers
ıe mortgagee the right to enforce the mortgage
icially, by merely giving notice of sale, and such
ɜe proceeds to enforce the mortgage in that manner.
y the condition is one which can, in the nature
ɜ, have no operation in this state, where such a mode
:ing mortgages is unknown; and, as a consequence, in
ɜ the clause stands in the policy as mere harmless sur-

remaining question, in connection with this first de-
, whether at the time of the fire foreclosure proceed-
l been commenced, within the meaning of the clause,
.icy shall be void if foreclosure proceedings are com-
" Strictly speaking, there is in this state no such thing
:closure proceeding. Here, however, as elsewhere, mort-
ıve to be enforced, and this clause evidently has applica-
vhatever proceedings may be appropriate for the enforce-
mortgages.
his in Louisiana means judicial proceedings, since here
;es are not enforced extrajudicially. Waivers of delays
legal formalities may have the effect of facilitating and
ng very much the enforcement of the mortgage or the
ıre proceedings, but they do not of themselves consti-
ch enforcement or foreclosure proceedings. They are
of consent; perhaps of reluctant consent, still of con-
They may be made, as happened in the present case, for
r purpose of staving off foreclosure proceedings. [1025] The
btained in consideration of their being made might be
.ole year, or they might be made when the mortgage debt
; a twelve months to run, until the lapse of which, en-
ɜnt or foreclosure proceedings would be a legal impos-
. They, or most of them, are not infrequently met with
very act itself in which the mortgage is given. If they
ıte a commencement of foreclosure proceedings, then
uch mortgages it may be said that their death knell began
ounded simultaneously with their birth; in other words,
.ey were born dead. We think that in Louisiana "com-
nent of foreclosure proceedings" must be held to be syn-
ıs with "filing of suit."

It is strenuously, but rather vaguely, argued that these stipulations against foreclosure and change of interest and notice of sale were inserted as a protection against the greater moral risk which a diminution of motive on the part of the insured to preserve the property, consequent upon a diminution of his interest therein, would bring about, and that under the facts of the case there was such a diminution of interest and of motive, and such increment of risk, the insured having fully realized that the property was lost to him—having, in fact, as it were, abandoned it to his creditors—and that consequently the contingency sought to be guarded against by the stipulations had come about, and the policy become void, at the date of the fire. The argument is only specious. The answer is that, taking the word "interest" in the sense of proprietary or insurable interest, the insured had as plenary interest in the property at the time of the fire as he had had theretofore, and that, so far as diminution of motive in preserving the property is concerned, the policy does not undertake to stipulate sweepingly against any and all diminution of motive, from whatever cause, but only against such as might result from the occurrence of certain specified contingencies, namely, those of foreclosure and change of interest and notice of sale, and that these contingencies thus specifically stipulated against have not happened, or, at any rate, are held in this opinion not to have happened.

Concluding, then, that the first defense is not good, and that the policy was in full force [1026] when the fire occurred, we have to consider the second defense—that the amount claimed is excessive. The insurance was eight thousand dollars, and the entire amount, less thirty dollars, theretofore paid for a partial loss, is demanded. It has been seen that the property as a whole —that is to say, the buildings, together with the lot they stood on—could not be sold at auction for seven thousand seven hundred dollars. If from the seven thousand seven hundred dollars is deducted the value of the naked lot, estimated as high as three thousand five hundred dollars, there is left an amount very much below that claimed by plaintiff, and defendant insists upon that mode of arriving at the value of the property. But it is a very common thing for property not to bring its real value at auction, and in fact for property not even to be salable at its real value; and what the defendant company has bound itself to make good is not the market value of the property, but its "actual cash value."

ɜ actual cash value is to be ascertained is stated
ican and English Encyclopedia of Law, page 367, as
:xcept as otherwise provided by valued policy laws,
ɜ of the insurer's liability in case of a destruction of
g is the fair value of the property destroyed, or, as
ı put, the intrinsic value of the building, not the
ıilding, nor the difference in the value of the ground
ithout the building. And it is the real value of the
such, not its relative value to the insured."
ɜ to the above we find the following: "The insurer
ıplain if he pays no more than the value of the prop-
insured, no more than the sum insured upon it, and
an the interest of the insured at the time of the loss.
ays no more than an indemnity under his contract.
efense to him that the loss may, by reason of other
ınd independent contracts, give an advantage to the
Vashington Mills Emery Mfg. Co. v. Weymouth etc.
re Ins. Co., 135 Mass. 503."
nstant case the insured property cost originally eight
ınd sixty-one dollars, and improvements had been
it. The cost of rebuilding would have been at least
r cent greater, owing to the rise in the price of ma-
labor. The deterioration is estimated at ten [1027] per
ıintiff testified the insured property was worth eight
five hundred dollars. Under all the circumstances,
the judge a quo was right in allowing the full amount
ırance.
ɜnt affirmed.

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tion in a Contract of Insurance that the policy shall be
the commencement of foreclosure proceedings is valid, and
foreclosure is held to be commenced when a petition is
the insurer: Findlay v. Union Mut. Fire Ins. Co., 74 Vt.
l. 429, 93 Am. St. Rep. 885, and see, on foreclosure proceed-
voiding the insurance on property, the cases cited in the
ɜnce note thereto. It has been held that the insurer is
a loss, although the property is advertised for sale under
ɜed before the fire, provided the insured has no notice of
tised sale, except such as has been obtained from reading
rtisements, which the agent of the insurer has also seen,
ɔolicy has not been canceled: Horton v. Home Ins. Co., 122
l, 65 Am. St. Rep. 717, 29 S. E. 944. But see Springfield
ıundry Co. v. Traders' Ins. Co., 151 Mo. 90, 74 Am. St.
52 S. W. 238. And it has also been held that a sale under
contained in a mortgage, but without any decree or other
proceedings, does not avoid the insurance, if by the law of
, the sale must be reported to a court of equity and there
l before it becomes final: Hanover Fire Ins. Co. v. Brown,
4, 39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

TUTTLE v. BLOW.

[176 Mo. 158, 75 S. W. 617.]

RECEIVER FOR MORTGAGED PROPERTY—Grounds for.—Pending a suit to foreclose a mortgage on a trademark and the right to make and sell a proprietary medicine, the court may appoint a receiver and grant an injunction on averments that the property is insufficient to pay the debts for which it is pledged, that the mortgagors dispute the validity of the mortgage and are so using the subject of it as to anticipate and discount its income, and that at least one of them threatene to disclose the secret formula and thus destroy the business. (p. 493.)

RECEIVER AND INJUNCTION—Notice to Defendant.—A court may, upon a proper showing, appoint a receiver and issue an injunction without notice to the other side, but only in cases of great emergency, and even then the defendant should be afforded a speedy hearing on a motion to vacate the order. (p. 493.)

MORTGAGE—What Property may be Encumbered.—As a rule, anything or any right capable of passing by succession, descent, or absolute sale, is capable of being encumbered by mortgage. (p. 494.)

MORTGAGE.—A Trademark connected with the right to make and sell the thing which it indicates is susceptible of being transferred by mortgage. (p. 495.)

S. H. King, for the appellants.

Noble & Shields, W. H. Ludwig and Dawson & Garvin, for the respondents.

166 VALLIANT, J. This is the second appeal in this case. It is a suit to foreclose a mortgage, and, ancillary to the main object, the equity powers of the court are invoked to preserve the property by placing it in the hands of a receiver pending the suit and enjoining the defendants from taking

tion calculated to impair the value of the security. filing of the petition a receiver was appointed and tion granted; there were motions by defendants to order appointing the receiver and to dissolve the , which motions were overruled and an appeal taken. hearing in this court that appeal was dismissed and was remanded to the circuit court with directions to final hearing on the merits, first affording defend- to file an amended answer. This court on that ap- that the only question presented by the record in its ition was, Did the circuit court have jurisdiction to orders complained of? and the judgment was that it such jurisdiction: Tuttle v. Blow, 163 Mo. 625, 63

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ne cause was returned to the circuit court defendant and a trial on the merits was had, which resulted in for plaintiffs, from which some of the defendants eal.

rtgage which the plaintiffs seek to foreclose was exe- the defendants, the Blows, September 17, 1889, to ht notes made by them of that date, aggregating t, bearing eight per cent interest, maturing in series from eighteen months to eight years, payable to the Edwin Curd, who is the plaintiffs' assignor.

operty mortgaged is thus described in the granting the instrument: "That said parties of the first part n consideration [describing the notes] do by these sell, assign and transfer [167] and set over to the said he second part, all their right, title and interest in a ademark for eye-salve, which was duly registered in t office of the United States, by William T. Blow, of , Missouri, and recorded in the patent office and de- be in force for thirty years from the 25th of February, ich said trademark is numbered 1142, and is for the right for manufacture and sale of T. L. Stephens Eye-Salve, as also all our right, title and interest in it and proprietary right in and to T. L. Stephens Eye-Salve, provided always this sale, transfer and it are upon this express condition, that is to say," etc. ows the condition that the sale is to become void if are paid, otherwise the mortgagee is given the power ten days' notice.

he trial it was shown that William T. Blow in his wned a secret formula according to which a proprie-

tary medicine called "T. L. Stephens Chemical Eye-Salve" was manufactured and sold in the market. Although the sale of this article was quite extensive and yielded the proprietor an income of $12,000 a year, yet the article itself was small and was not of sufficient proportions to require the maintenance of a manufactory, but under the supervision of one man, Michael Fredericks, employed for that purpose, sufficient quantity of the salve to supply the trade for twelve months was made up and put into condition for sale within six weeks. The salve was put up in small bottles or vials, on each of which was a small label of particular design, and on each box of a dozen vials was a larger label of the same design. This label had been so long used in connection with the salve that it was well known in the market and was a mark by which the article was known to the trade. It thus became the trademark of the proprietor of the compound. In 1873, Mr. Blow had this trademark registered in the patent office at Washington and received a certificate thereof, [168] as was contemplated in the act of Congress of 1870 relating to trademarks. That act was afterward declared unconstitutional by the supreme court of the United States, and the certificate of registration, therefore, became of no legal effect. Mr. Blow died in 1877 and his widow and two sons, defendants originally herein, became owners of the title that he had owned to the secret formula, the trademark and the right to manufacture and sell the proprietary medicine. They continued the business as he had done, with some variations in the business methods, and were doing so down to the time that this suit was instituted, when the receiver took the business out of their hands. Under the management of the widow and sons the business does not seem to have been as successful in yielding revenues as it had been in the lifetime of Mr. Blow, although it still yielded the proprietors a large income.

On March 1, 1883, Mrs. Blow borrowed of F. W. Mott $2,000, and of Mrs. Leuders $3,500, and to secure the same made an assignment of her right in this eye-salve and trademark to them. In that assignment the thing conveyed was described as a patent right to manufacture and sell the salve under letters patent issued by the United States. The instrument was drawn by a man who was not a lawyer and who with the certificate of registration of the trademark before him interpreted it to be letters patent and thus described it:

s, letters patent bearing date the twenty-fifth day
y, A. D. 1873, were granted and issued by the gov-
of the United States of America, under the seal
William T. Blow, of St. Louis, Missouri, for a cer-
mark for eye-salve, styled 'Dr. T. L. Stephens Cele-
emical Eye-Salve,' which patent is No. 1142, and
February 25, 1873, and to which patent reference
made for a full and particular description of said
and eye-salve, which is annexed to said letters pat-
hich letters patent the full and exclusive right and
making [169] and using said invention, and of vending
o others to be used, was granted to the said William
his heirs, executors, administrators and assigns, for
f thirty years from the date thereof."
000 secured by that instrument was afterward paid,
3,500 was unpaid. The parties interested in that
were made parties defendants. When Mr. Curd took
age under which the plaintiffs claim, he knew of the
of the mortgage in favor of Mr. Mott and Mrs.
Upon the execution of the mortgage to Curd, and
of the transaction, the secret formula under which
lve was compounded was given to him in a sealed
Up to August 16, 1894, the mortgagor had made
on the Curd debt amounting to $8,498.94; since that
ing has been paid on it. There were averments in
on to the effect that the mortgagors in possession
ucting the business in a manner to indicate that they
avoring to realize as much as possible at once and
e value of the property, and it was upon that showing
ourt appointed a receiver and granted the injunction.
ence at the trial tended to sustain those averments.
receiver was appointed the package containing the
mula was delivered to him and by order of the court
l it and continued to conduct the business as nearly
lan that it had theretofore been conducted as good
for the interest of all concerned seemed to dictate.
the suit William T. Blow, Jr., died, and his admin-
as entered his appearance, and also since the suit was
enjamin E. Blow has transferred to S. H. King his
n the mortgaged property and Mr. King has answered.
ppeared that since the commencement of the suit Isaac
l by purchase become the owner of all the notes covered
aintiffs' mortgage.

By the finding of the court there is due Mrs. Leuders [170] $3,741.67 on her mortgage and there is due the plaintiff, Isaac Curd, as purchaser from Tuttle, assignee of Edwin Curd, on his mortgage, $55,409.34.

The decree takes the form of a judgment for $3,741.67 in favor of Mrs. Leuders against Mrs. Blow, and for $55,409.34 in favor of Isaac Curd against Mrs. Blow, Benjamin E. Blow and the administrator of William T. Blow, Jr., deceased, and in default of payment of the judgments a foreclosure of the mortgage is decreed and a sale of the secret formula, the trademark and the exclusive right to manufacture and sell the salve mentioned in the name of "Dr. T. L. Stephens Chemical Eye-Salve," and out of the proceeds after paying costs, one-third, or a sufficient part of one-third, is to be paid to Mrs. Leuders on her mortgage, and the rest to the extent of his debt to plaintiff Isaac Curd, and the balance, if any, to be returned into court to be disposed of as the court may thereafter order.

The learned counsel for defendants has favored us with an elaborate brief in which he has given us the result of an exhaustive research into the books and has discussed the case from several standpoints, but all the propositions laid down may be grouped into two, viz.: 1. That the court had no authority under the showing made to appoint the receiver and issue the injunction when and as it did; 2. That the thing or the right attempted to be mortgaged was not susceptible of being incumbered by a mortgage.

1. Upon the former appeal in this case it was decided, Brace, P. J., delivering the opinion, that notwithstanding the fact that the proceeding to foreclose a mortgage under the terms of our statute (Rev. Stats. 1899, sec. 4342) was an action at law, yet the circuit court as a court of equity still retained the same jurisdiction to foreclose mortgages and adjust the rights of the parties thereunder which was originally exercised by courts of chancery. Whether in this case the court had properly exercised its judicial discretion in making the appointment [171] of the receiver and issuing the injunction, the record then before us did not warrant us in deciding. But as the record is now here with all the showing made by the plaintiffs, the question is one for decision. The jurisdiction of the court on proper showing to make such orders is not questioned, but it is insisted that the proper showing was not made, and it is complained that the court acted without notice to the defendants,

ir property from them without giving them a hear-

ere averments in the petition going to show that the
or the incorporeal right conveyed in the mortgage,
icient in value to pay the debts for which it was
id that the defendants, the mortgagors, not only dis-
validity of the mortgage, which was a fact in itself
depreciate its value, but they were so using the sub-
e mortgage as to anticipate and discount its income,
of them at least threatened to disclose the secret
nd thus destroy the value of the business. A chan-
ld not under those circumstances have rightfully re-
prayer of the plaintiff for the preliminary orders
the safe custody and preservation of the property
. The court may, under a proper showing, appoint
and issue an injunction without notice to the other
it should do so whenever it is made to appear that
tinous to the plaintiff's rights is contemplated, and
en to the defendant would enable him to accomplish
the court could prevent it. But the appointment of
without notice is the exercise of an extraordinary
d should be done only in cases of great emergency,
then the defendant should be afforded a speedy hear-
motion to vacate the order: St. Louis etc. R. R. Co.
135 Mo. 230, 36 S. W. 357; High on Receivers, 3d
111, and following. The only notice required by our
an application for injunction is in case the injunction
ought to stay proceedings at law: Rev. Stats. 1899,
3. But the court in any case may and ordinarily
equire reasonable notice before issuing an injunction
ind. The record in this case shows that the defend-
e afforded an opportunity to be heard without delay
tion to vacate the orders and they were granted an ap-
the overuling of their motion and every opportunity
rded them to right any wrong that was done them.
nothing in the action of the court in relation to the
nent of the receiver or issuing of the injunction of
e defendants now have any cause to complain.

pellant's main insistence, however, is that the mort-
plaintiffs is of no force or effect because the thing or
t attempted to be mortgaged is not susceptible of being
nbered.

The mortgage of plaintiffs describes the trademark as "a certain trademark for eye-salve which was duly registered in the patent office of the United States by William T. Blow, of St. Louis, Missouri, and recorded in the patent office and declared to be in force for thirty years from the twenty-fifth day of February, 1873, which said trademark is numbered 1142 and is for the exclusive right for manufacture and sale of T. L. Stephens Chemical Eye-Salve," etc. The act of Congress under which that registration was authorized was afterward declared to be unconstitutional; therefore, no right was acquired by it. But whilst the registration and the certificate imparted no new right to the holder of the trademark, it did not detract from the right he already had. The terms of the mortgage do not purport to convey to the mortgagee a right acquired under the act of Congress by the registration, but what it does convey in the clause just quoted is the trademark; that is, that trademark which he had before owned and which he registered.

But in addition to the trademark the mortgage conveyed [173] "also all our right, title and interest in the patent and proprietary right in and to T. L. Stephens Chemical Eye-Salve." And with the mortgage they gave the mortgagee a sealed parcel containing the secret formula to be used in case it became necessary to foreclose the mortgage. So that the mortgage conveyed the trademark, the exclusive right to make and sell the eye-salve and to use the trademark in connection therewith and in order to enable the mortgagee to realize the right conveyed, the formula was also given him.

It may be conceded to appellants that a mere trademark dissociated from the trade or business is not susceptible of sale or transfer. As such it is of no use and the law will take no account of it. But a trademark as an accessory of property or as a thing to be used in connection with one's business and applicable to the product of his manufactory or to his goods in trade, is a subject of the law's care and is assignable: Browne on Trademarks, 2d ed., sec. 57.

As a general rule any thing or any right that is capable of passing by succession or descent to the personal representatives or heirs of an intestate, or that is capable of passing by absolute sale, is capable of being incumbered by mortgage. The mortgagors themselves claim to own this trademark and the proprietary medicine by succession from William T. Blow, de-

The administrator of William T. Blow, Jr., is here his interest by succession as assets of the estate, and g is here also claiming a one-third interest by assign- Iow, then, can they be heard to say that the right is nable?

some of the authorities cited in their brief bear out llants' contention that a trademark unconnected with ›erty or trade is a mere abstract right of which the take no account, none of them sustain the proposition ademark connected with the right to make and sell the ıich [174] it indicates is not susceptible of being trans- / a mortgage.

the Leuders mortgage, the only question in its way ard to the description of the right or thing mortgaged. vener had before him the certificate of the registration :rademark; he saw that it emanated from the patent ıd he concluded that it was a patent right. But the . appear on the face of the instrument to show what it as in spite of the misnomer. It is the same trademark d in the plaintiffs' mortgage, and in attempting to state l effect the scrivener says: "by which letters patent ıg the certificate of registration] the full and exclusive ıd liberty of making and using said invention [mean- eye-salve] and in vending the same to others to be used, ınted to William T. Blow, his heirs, executors," etc. h right was by that certificate granted to Mr. Blow, had that right independent of the certificate, and the ıeaning of the mortgage in spite of its clumsy verbiage, that right, together with the trademark, is pledged for ment of the $5,500 which the mortgagor then borrowed faith of it. No other construction can be put upon it t impugning the good faith of the mortgagor, which we › right to do.

circuit court took the correct view of this case, and the ɜnt is affirmed.

:oncur.

ıppointment of a Receiver for mortgaged property is discussed monographic notes to Cortelyou v. Hathaway, 64 Am. Dec. ; Hardin v. Hardin, 27 Am. St. Rep. 794-798; Cameron v. ınd Impr. Co., 72 Am. St. Rep. 74-80.

a Trademark can be sold or transferred like other property, ıwell v. Hazard, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. ınt v. Head, 90 Ky. 255, 29 Am. St. Rep. 369, 13 S. W. 1073.

MEDDIS v. KENNEY.

[176 Mo. 200, 75 S. W. 633.]

EXECUTOR'S SALE—Estoppel by Accepting Proceeds of.—A son who, on an executor's sale of his father's estate, accepts his distributive share, knowing it to be such, is estopped to question the sale and the conveyance made by virtue of it. (p. 500.)

HOMESTEAD—Widow's Possession not Adverse.—A widow's possession of the homestead is, in its inception, friendly, and not adverse to the heirs of the husband or their assigns, and will be regarded as so continuing until disclaimed by hostile acts or declarations. (p. 500.)

EXECUTOR'S SALE, When Cause Transferred to Circuit Court.—When the court of common pleas of Missouri, the judge thereof being disqualified, certifies a case to the circuit court, that court has jurisdiction to order an executor's sale, although the record does not show the steps leading up to the transfer of the case. (p. 501.)

FOREIGN CORPORATION—Right to Enforce Demands.—Sections 1024-1026 of the Revised Statutes of 1899, of Missouri, do not prohibit a foreign corporation which, in the course of business in its home state, becomes the assignee or holder in trust of a claim against a citizen of Missouri, from coming into the state and pursuing every remedy and resorting to every means that a citizen might to collect or secure the benefit of that claim, including the right to purchase at an executor's sale. (p. 501.)

EXECUTOR'S SALE—Notice, Raising Question of an Appeal. If the point is not made in the trial court that an executor's deed shows on its face that the notice of sale was not published for the requisite time, the question cannot be raised on appeal. (p. 502.)

J. W. Limbaugh, for the appellants.

Angelo Dempsey and Robert L. Wilson, for the respondent.

[203] ROBINSON, J. This is an action of ejectment in statutory form to secure possession of the north half of lot three, range "A," in the city of Cape Girardeau, Missouri, known as the John Albert homestead.

The suit was originally begun in the Cape Girardeau court of common pleas, against the defendant Nancy R. Kenney, the tenant in possession. Afterward, H. H. Albert, the landlord of the defendant Kenney, was, on his own application, made a party defendant, and the venue changed to the Cape Girardeau circuit court, where the cause was tried by the court without a jury, resulting in a judgment for the plaintiff, from which defendants have appealed to this court. The petition is in the usual form, and the answer a general denial.

ɔrd shows that John Albert died testate, in Cape county, Missouri, in August, 1881, leaving surviv- ıis widow, Terresa Albert, and the following chil- it: Anna, William, Robert, Clement, Jules and the H. H. Albert. That John Albert at the time of his seized of the land in suit and occupied it as his . Both parties claim through him as the common title. By the last will of John Albert which was ated in that county, Linus Sanford was appointed After giving to each of his children the sum of one : will provides: "To my wife, Terresa Albert, I give ath all the balance of my property of every kind, eal or personal, after the payment of my debts." ualified and proceeded to administer on the estate. Sanford, as such executor, filed his petition in the ardeau court of common pleas, a court possessing ɔrobate jurisdiction, setting forth the fact that the ɔroperty was insufficient to pay the debts of [204] the d prayed for an order authorizing him to sell the uestion. At the next term thereof, it appearing that ' elected judge of the court having been of counsel :. Albert and his brother and sister, was disqualified the matter, an order of record was made certifying to the Cape Girardeau circuit court, as provided by 760 of the Revised Statutes of 1899, and the clerk ted to transfer all of the original papers therein to it court. Thereupon the circuit court, at its May 97, made an order authorizing the executor to sell at ıtcry the lot in question for the payment of debts, ; of sale being one-fourth cash and the balance pay- ix months. The order was renewed at the August 97, and on the fifth day of June, 1898, the executor, ing the lot appraised, sold the same at public sale in e of the order aforesaid at which sale the Fidelity ıfe Vault Company, a Kentucky corporation, became haser, for the sum of two thousand and five dollars. te of Terresa Albert, the administration of which was in the city of St. Louis, held fifth-class demands he estate of John Albert, amounting in the aggregate eighteen hundred dollars, and the Fidelity Trust Safe ompany held a sixth-class demand, as trustee, against ıte for fifteen hundred dollars. Shortly prior to the

sale the executor represented to the agent of the Fidelity Trust Safe Vault Company that he did not desire to handle any of the purchase money to be paid for this property, except an amount necessary to pay expense of sale, and stated that if the Fidelity company would purchase these demands against the estate, he would accept them as cash. Thereupon the Fidelity company purchased all the outstanding demands against the estate, except the one held by it as trustee, and paid the costs of the sale, including the executor's commission. The money derived from the proceeds of the sale of the lot in question was paid to the defendant H. H. Albert, and his brothers and sisters. [205] Upon these facts the circuit court, at the next term thereafter, approved the sale and ordered the executor to make a deed to the purchaser. Afterward one of the securities on the executor's bond having died, the circuit court, upon the application of a creditor of the estate, ordered the executor to give a new bond. Having failed to comply with this order, the executor's letters were revoked, and Leon J. Albert was appointed as administrator de bonis non with the will annexed, and duly qualified as such. On the eighth day of February, 1899, the Fidelity company, having assigned its bid to the plaintiff herein, a deed was made by the administrator at the request of the Fidelity company to the plaintiff in pursuance of the sale, which was duly approved by the court. This deed constitutes plaintiff's claim of title to the land in question. The record further shows that after John Albert's death the lot in question was occupied by his widow Terresa Albert, until her death, which occurred in September, 1894, and that thereafter her children occupied the premises until May 26, 1898, when they, after receiving their share of the proceeds of the sale, conveyed the lot by quitclaim deed to the defendant, H. H. Albert, whose tenants have been in the possession thereof since, and he claiming title to the premises from that time, by virtue of the deed so procured from his brothers and sisters. At the close of the case the following declarations of law were given at plaintiff's request:

"1. The court declares the law to be that if Terresa Albert took the real estate in controversy under the will of John Albert, and the will devised the property to her subject to the payment of his debts, then she took the real estate in controversy cum onere, and her heirs are estopped from denying that the real estate is subject to sale for the payment of said debts of said John Albert, deceased.

he court declares the law to be that if the children of d Terresa Albert accepted the proceeds [206] of the sale al estate made by the executor of John Albert, know- be so, on the allowance to the estate of Terresa Al- it was a ratification of said sale, and they are estopped n contesting said sale or the conveyance made by the rator by virtue of said sale.

ie court declares the law to be that the property in rsy was used and occupied by John Albert as a home- his lifetime, and was so used at the time of his death, his death his widow took a homestead interest and a homesteader her occupancy and possession of said were not adverse to the heirs or purchasers at ad- tion sale, nor did the statute of limitations run against or during the time she occupied said premises as a der could she enlarge her estate from a homestead, state, by claim of adverse possession."

efendants asked the court to give the following declara- law numbered 1, 2, 3 and 4:

ie court declares the law to be that under the evi- this cause, plaintiff is not entitled to recover, and the nd judgment of the court should be for defendants.

ie court declares the law to be that if the court shall n the evidence that defendant, H. H. Albert, and der whom he claims have held the property in contro- r a period of more than ten years prior to the com- nt of the proceedings in the estate of John Albert, ecutor, to have the land sold for the payment of debts ohn Albert, and that said holding of said property has n, notorious and adverse to all the world, said occu- aiming title thereto, then the finding and judgment e for defendants.

he court declares the law to be that the circuit court Girardeau county had no jurisdiction to order or ad- e sale of the real estate in controversy, and that said dgment of sale and [207] the deed made thereunder to was and is void, and plaintiff acquired no title there- or to the real estate in controversy, and the finding e for defendants.

he court declares the law to be that the Fidelity Trust ety Vault Company could not become the purchaser property in suit, nor take, nor hold, the legal title and the court further declares the law to be that

plaintiff herein could not become the purchaser of said property nor acquire the title thereto for the use or benefit of said Fidelity Trust and Safety Vault Company, and that the deed to plaintiff is wholly void and vests no title in plaintiff, and the finding and verdict should be for the defendants."

The court gave defendants' declaration numbered 2, but refused those numbered 1, 3 and 4. The defendants complain of the action of the court in respect to the giving and refusing of declarations asked.

The objection urged against plaintiff's first declaration is that it is unsupported by evidence. This objection is obviously based upon a misapprehension of the facts of the case. The record shows that the lot in question was sold for the payment of debts. This instruction announced a correct proposition of law and is predicated upon facts in testimony and was properly given.

Plaintiff's second declaration of law given, although not as accurately framed as it might have been, is in harmony with the principles of law dominating the case. The defendant, H. H. Albert, in receiving his distributive share arising from the proceeds of the sale of the land by the executor (as did also his brothers and sisters, through those deeds he now claims title to the property), is clearly estopped from asserting that title, as against the title conveyed by the administrator's deed. The declaration shows the thought in the mind [208] of the court in deciding the case. It was in no way prejudicial to defendant.

No error is perceived in the action of the court in giving plaintiff's third declaration. It is firmly settled in this state that the widow's possession and occupancy of the homestead is, in its inception, perfectly friendly and not adverse to the heirs of the deceased husband or their assigns, and will be regarded as continuing so until disclaimed by hostile acts or declarations: Chouteau v. Riddle, 110 Mo. 366, 19 S. W. 814; Hickman v. Link, 97 Mo. 482, 10 S. W. 600.

We are unable to find anything in the criticism of the declarations of law given in behalf of plaintiff to indicate that the case has been tried upon a wrong theory, or that an improper judgment has been produced on account of them.

The next assignment of error relates to the refused declarations of law requested by defendant. His first declaration of law asked was in the nature of a demurrer to the evidence and

was properly refused. The testimony amply justified a finding for the plaintiff.

There was also no error in refusing defendant's declaration numbered 3. This declaration was predicated upon the theory that the order of the Cape Girardeau court of common pleas, ransferring the case to the circuit court, did not have the effect f conferring jurisdiction on that court to order the sale of he real estate in question as it did in that proceeding. This osition, we think, cannot be maintained. While it is true e record does not show the antecedent steps leading up to the der certifying the case to the circuit court, yet it very clearly pears that an order was duly made by the Cape Girardeau urt of common pleas certifying the cause to the circuit court, ich, under section 1760 of the Revised Statutes of 1899, the pe Girardeau court of common pleas was authorized to do, d this, too, when the judge is disqualified of his 209 own mon, without any formal application or affidavit therefor. Moreer, it will be presumed in the absence of countervailing cirnstances that the circuit court in ordering the sale of the d in question, being a court of general jurisdiction, acted by it and not from wrong: State v. Bank of Neosho, 120 Mo. , 25 S. W. 372. We therefore hold that the order certifying cause to the circuit court conferred upon that court jurision to order the sale of the land in question.

he fourth declaration asked by defendant was properly de. There is nothing in sections 1024 to 1026 of the Revised utes of 1899, to which we are referred by appellant as his ority for asking declaration of law numbered 4, that was d by the trial court, that can in any way be said to pro- a foreign corporation, such as the Fidelity Trust Safe Vault pany, that, in the course of business in its home state, has e the assignee or holder in trust of a claim against a n of this state, the right to come into this state and purvery remedy and resort to every means that a citizen of tate might do to collect or secure the benefit of that claim. ection of the statute above referred to only applies to those ations who have or desire to become established here as ent foreign corporations," and does not apply to foreign ations not established in this state, and a discussion of ections and the requirements thereof will serve no good e here. The declaration was properly denied by the trial

The defendant further assails the judgment rendered herein, for the reason, as he now asserts, that it appears in the deed from the executor to respondent, under which he claims to own the lot in controversy, that the notice of sale of the property was not published for the requisite period of time. This question was not raised in the trial court, but is made here for the first time on this appeal. No objection was made in the trial [210] court in reference to the sufficiency or validity of the notice of sale, and inasmuch as no point was there made, either at the trial or in the motion for a new trial, in reference to the advertisement of the sale, or that proper notice of sale had not been given, it cannot be taken advantage of here. The case must be disposed of here on the same lines it was heard in the circuit court: Rev. Stats. 1899, sec. 864; Gorham v. Kansas City etc. Ry. Co., 113 Mo. 408, 20 S. W. 1060; St. Louis v. Sieferer, 111 Mo. 662, 20 S. W. 318; Haniford v. City of Kansas, 103 Mo. 172, 15 S. W. 753.

No error prejudicial to defendant appearing, the judgment of the trial court will be affirmed.

All concur.

A Widow Who Remains on Her Husband's Land does not hold adversely to the heirs: Page v. Branch, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625. Her possession, either in her dower or quarantine right, is in subordination to their title: Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38, 28 South. 402. See, too, Johnson v. Oldham, 126 Ala. 309, 28 South. 487, 85 Am. St. Rep. 30, and cases cited in the cross-reference note thereto: Ashford v. Ashford, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; Dewitt v. Shea, 203 Ill. 393, 96 Am. St. Rep. 311, 67 N. E. 761.

Heirs are Estopped to deny the validity of an administrator's sale, and at the same time enjoy the benefits derived from the appropriation of the purchase money: Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197. See, also, Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325; Wilmore v. Stetler, 137 Ind. 127, 45 Am. St. Rep. 169, 34 N. E. 357, 36 N. E. 856; Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68. But a minor heir who receives no money upon the settlement of the accounts by the administrator is not estopped from contesting the validity of a sale made prior to the settlement: Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617. And it has been held that a void administration sale is not rendered valid against heirs because they receive the benefit of the proceeds, especially when they are minors: Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

WILSON v. LUBKE.

[176 Mo. 210, 75 S. W. 602.]

MECHANIC'S LIEN—Owner of Land.—A mechanic's lien nust have for its foundation a contract made by the owner of the and, not necessarily the absolute owner in fee, but the owner of he estate to be charged with the lien. (p. 505.)

MECHANIC'S LIEN.—If an Intending Purchaser makes a ontract for the erection of buildings on the land, and work thereoder is begun before the sale is consummated, and a deed of trust ecuted back to the vendor, as between the purchaser at the foreosure sale under the trust deed and the purchaser at the execution le under the mechanic's lien, the former takes the superior title the land, and the latter the superior title to the buildings. (p. 6.)

MECHANIC'S LIEN—Justice's Finding as Res Judicata.—a mechanic's lien is enforced in a justice's court, a finding, which not essential to establishing the lien, that the defendant owned land at a certain date, does not preclude one claiming under a st deed of the land from showing in the circuit court that the endant was not the owner at that time. (p. 507.)

QUIETING TITLE—Adjusting Equities.—In a suit to quiet e under the Missouri statutes, the court may decree that, as ween a purchaser at a sale under a deed of trust and a purchaser sale under a mechanic's lien, the former takes the superior title he land, and the latter the superior title to the buildings, but it not charge the amount of the mechanic's lien on the buildings, the right of the former to pay the same within a certain time, thus redeem the property, and with the right of the latter, in ult of such payment, to remove the buildings within a specified . (p. 507.)

. Christy Bryan, Willi Brown and George W. Lubke, Jr., the appellant.

assieur & Rassieur, for the respondent.

VALLIANT, J. This is a suit under the statute to title to real property: Rev. Stats. 1899, sec. 650. Plainlaims as purchaser at a foreclosure sale under two deeds of . Defendant claims as purchaser at a sheriff's sale under tion upon two judgments establishing merchanics' liens. question is, Which was the prior lien?

e facts are as follows: On June 30, 1897, one Laumeier he east half of the lot in question to Ida M. Smith, and est half to John M. Houser and wife; at the same time I. Smith executed back to Laumeier a deed of trust on alf of the lot sold to her, to secure her notes to him for housand dollars and interest, and Houser and wife likeexecuted back to Laumeier a deed of trust on the half

sold to them to secure their notes for a like sum and interest. The notes covered the purchase money of the lot and money advanced by Laumeier to build houses on the same. The deeds from Laumeier to Smith and Houser, and the deeds of trust from them back to him, were all executed and filed for record at the same time on June 30, 1897. On September 28, 1898, those deeds of trust were regularly foreclosed, the plaintiff became the purchaser and received the trustee's deeds. That is the plaintiff's title.

Before Ida M. Smith and Houser and wife purchased the lot from Laumeier, but in contemplation of such purchase, they made a contract with one Claus for the erection of certain buildings on the lot. Claus [214] conducted the negotiations for Smith and Houser in the purchasing of the lot, and without waiting for the completion of the purchase, and without the knowledge of Laumeier, began excavation for the buildings on the 28th of June, and sublet the mill work to the Tower Grove Planing Mill Company, which concern began delivering the material for the buildings on the ground on June 29th, which was one day before the consummation of the purchase of the lot by Smith and Houser from Laumeier, and one day before the execution and delivery of the deeds above mentioned. Shortly after the execution of the deeds Laumeier delivered the money he advanced for the buildings to Claus, who, as already said, was acting in the matter for Smith and Houser, so that Claus, the contractor, received the contract price of the buildings in advance.

The Tower Grove Planing Mill Company, beginning on June 29th, continued to deliver materials which were used in the buildings up to September 18, 1897. After giving due notice, that concern on January 6, 1898, filed two mechanics' liens, one against each building, for three hundred and ten dollars each, and on January 8th filed suits in a justice's court to enforce the same, one against Ida M. Smith, the other against Houser and wife. Claus and Laumeier were made parties defendant in both suits. There was a judgment for plaintiff in each suit for three hundred and seventeen dollars and seventy-five cents and costs, which was a personal judgment against Claus, the contractor, and special against the lot and building. In each judgment was a recital that the materials, for the value of which the plaintiff sued, were begun to be delivered on the lot on June 29th, and continued until September 18th, and that Smith and Houser were the owners, respectively, at those dates.

Executions issued on those judgments, and at a sale by the sheriff thereunder, the defendant, as trustee for his clients, became the purchaser, and received the sheriff's deed. That is the defendant's title.

There were executions under other mechanic's lien [215] judgments in evidence, but in those it appeared that the materials were not delivered until after June 29th. Those executions, however, informed the court of the aggregate amount of all the mechanics' liens against the houses. The decree of the court that the plaintiff had the better title to the land, but the defendant the better title to the buildings; that the amount of all the mechanics' liens against the houses was fifteen hundred and forty-five dollars and eight cents, that if plaintiff would pay that sum and six per cent interest from date to the defendant within thirty days, the plainiff's title to land and houses would be perfect, but unless he paid that sum within that time, defendant had the right to remove the houses from the land within ninety days. The plaintiff was satisfied with the decree, but the defendant appeals.

1. A mechanic's lien must have for its foundation a contract made by the owners of the land, not necessarily the absolute owner in fee, but the owner of the estate to be charged with the lien: Sawyer etc. Lumber Co. v. Clark, 172 Mo. 588, 73 S. W. 137. Until one is such owner he can make no contract that will impose a burden on the land. He may, in contemplation of becoming the owner, make a contract that will affect the land as soon as it becomes his property, but such contract cannot relate back beyond the date of his purchase so as to impair the rights of the former owner.

In the case before us Smith and Houser were not the owners of the land when they made the contract with Claus for the buildings, and they never thereafter became the owners, except as subordinate to the rights of Laumeier under these deeds of trust; they never had a title that rose above the rights secured by those deeds, therefore they could not impart such a title to another, either directly or indirectly, voluntarily or involuntarily.

The Tower Grove Planing Mill Company, claiming as subcontractor under the contract of Smith and Houser, can take no better title than they had; their [216] title was subordinate to the deeds of trust, and the title of the subcontractor can rise no higher.

Appellant contends, however, that the recitals in the justice's judgments that the delivery of the materials began on June 29th, and that Smith and Houser were the owners then, makes the fact of ownership at that date res adjudicata against Laumeier, because he was a party to those suits and is concluded by the judgments.

Whatever fact was necessary for the justice to find in order to establish the mechanic's lien, we must now consider was found, and such fact is not now disputable by the parties to that suit: Reilly v. Hudson, 62 Mo. 383. In the case just cited, by appellant, a judgment establishing a mechanic's lien, on account of a cooking range built in a house, had been rendered, and a sale had under execution on the judgment, and it was held that as between the parties to that suit the fact that the cooking range was attached to and became a part of the realty was adjudged in the suit to establish the lien and could not be again questioned that was a fact essential to the establishing of the lien. But in the case at bar it was not essential to the establishing of the lien of the Tower Grove Planing Mill Company that Smith and Houser were the owners of the land on June 29th. It was essential that they should have been the owners, but, for the purposes of that suit, the fact that they became the owners on June 30th was sufficient. If the fact was conceded that they owned the property on June 30th, it would add nothing to the force of the lien to show that they owned it on the 29th, nor would it detract from the effect of the lien to show that they did not own it before the 30th. The fact that the judgment recites that they owned the land on June 29th was immaterial.

Laumeier, as the holder of the notes secured by the deeds of trust, was made a party defendant in those suits. In this capacity of mortgagee his rights were not within the jurisdiction of the justice of the peace; [217] that is to say, the justice of the peace could not in those suits decide the question of the priority of the liens. The justice's jurisdiction extended only to matters relating to the establishment of the mechanic's lien and a judgment against the contractor. Since the justice could render no judgment as to priority of the liens his findings of facts could not be held to be conclusive in the circuit court in a suit between the parties to settle the question of priority. His findings are res adjudicata for the purposes for which he is to pronounce judgment, but they do not go beyond that. We hold that Laumeier is not precluded by the recitals in the justice's

judgments from showing that Smith and Houser did not own the land on June 29th, and since it appears that they did not own it on that day and that their title when acquired was subject to the deed of trust, the court was right in adjudging that Laumeier's title to the land was superior to that of defendant. And the court was also right in holding that the defendant's title to the buildings was superior to that of the plaintiff: Rev. Stats. 1899, sec. 4205.

2. This suit is brought under section 650 of the Revised Statutes of 1899, but the decree takes a wider range than hat statute authorizes. The limit of the power of the court nder that statute is "to define and adjudge by its judgment r decree the title, estate and interest of the parties severally ı and to such real property": Seidel v. Cornwell, 166 Mo. 51, 5 S. W. 971. It was proper, therefore, for the court to decree ıat the plaintiff's title to the land was superior to that of the efendant. And since the houses are attached to and have beme a part of the freehold, they may be considered as part of e real property within the meaning of the statute, and therere the court could, as it did by its decree, settle the rights the parties in respect to the houses. But when the court ıdertook to ascertain the amount of the mechanics' liens and arge them as an encumbrance on the houses in favor of deıdant with right in the [218] plaintiff to pay the same within given time and thus redeem the property, it went beyond the pe marked out by the statute. Besides, under the terms of tion 4205 of the Revised Statutes of 1899, after a sale under cution to satisfy a mechanic's lien judgment, and the purser has received his deed, the day of redemption has passed l the purchaser has a right within a reasonable time to reve the buildings off the land and is not bound to take a price them; the houses are his property, he can fix his own price them, or refuse to sell them at all. But he must remove n within a reasonable time. The narrow limits within ch the statute, under which this suit is brought, confines the ee, will not admit of the adjustment of the equities of the ies on this point, therefore the court cannot, in its decree his case, specify the time within which the defendant must ove the buildings. The statute says within a reasonable , and so the court in this case must leave it.

he judgment is reversed and the cause remanded to the circ court with directions to enter a judgment to the effect the plaintiff has title to the land named in the petition su-

perior to that of the defendant, that the defendant has title to the buildings on the land superior to that of the plaintiff, and that defendant has a right within a reasonable time to remove the buildings from the land, and that plaintiff and defendant each pay one-half of the costs.

All concur.

A Mechanic's Lien attaches only by virtue of work done or materials furnished under a contract with the owner of the property: Davidson v. Jennings, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354. It binds only such title as the person making the contract has: Taylor v. Murphy, 148 Pa. St. 337, 33 Am. St. Rep. 825, 23 Atl. 1134; Henderson v. Connelly, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1. A mechanic's lien for work done or materials furnished for one in possession under a contract of purchase, cannot be enforced against the owner of the property after such person in possession has failed to fulfill his contract or purchase the property: Steel v. Argentine Min. Co., 4 Idaho, 505, 95 Am. St. Rep. 144, 42 Pac. 585. But it will attach to the equitable interest in land held under a contract of purchase, and if that interest is afterward enlarged into a fee, the lien may be asserted against the whole title: Fullmer v. Poust, 155 Pa. St. 275, 5 Am. St. Rep. 881, 26 Atl. 643. See, too, Floete v. Brown, 104 Iowa, 154, 65 Am. St. Rep. 434, 73 N. W. 483.

MARSHALL & MITCHELL GRAIN COMPANY v. KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY.

[176 Mo. 480, 75 S. W. 638.]

CARRIER—Bill of Lading, When a Through Contract.—If the point of destination in a bill of lading is left blank, but an indorsement at the end thereof shows, in fact, that such point is beyond the carrier's own line, the contract is prima facie an agreement to carry to that place. (p. 514.)

CONNECTING CARRIER—Exempting from Negligence of.—Under the Missouri statutes, a carrier cannot contract for a through shipment to a point beyond its own line, and at the same time exempt itself from liability for the negligence of a connecting carrier. (p. 514.)

CONNECTING CARRIER, Negligence of—Interstate Commerce.—The Statute of Missouri extending the liability of a carrier for the negligence of connecting carriers when it receives goods for shipment to points without that state, beyond the terminus of its line, is not unconstitutional. (p. 514.)

CARRIER—Conversion by Delivery to the Wrong Person.—If a carrier disobeys the directions of a shipper as to whom delivery shall be made, he is liable for conversion, notwithstanding he offers, upon the goods being restored to him after their wrongful delivery, to return them to the shipper. (p. 515.)

L. F. Parker and Pratt, Dana & Black, for the appellant.

Thomas Dolan, for the respondent.

483 BURGESS, J. On August 5, 1895, Marshall & Antles, of whom plaintiffs are successors, delivered to the defendant a car of corn for shipment over its railroad from Joplin to Little Rock, Arkansas, with instructions on the bill of lading to notify the Little Rock Grain Company; Little Rock was not on the line of defendant's road, but the agent of defendant at Joplin, having authority to so do, contracted with the shippers to transport said car of corn to Little Rock, and received therefor the entire freight charge and rate between 484 Joplin and Little Rock, and delivered to the shippers a bill of lading for said car of corn. The bill of lading showed the receipt by defendant from Marshall & Antles of one car of corn said to weigh thirty-three thousand three hundred and seventy-five pounds, "to be transported over the line of this [defendant's] railway to . . . . and delivered after payment of freight and advance charges in like good order to the consignee, or a connecting carrier if the same are to be forwarded beyond the line of this company's road, to be carried to the place of destination; it being expressly agreed that the responsibility of this company shall not extend beyond its own line."

The bill of lading also showed that the corn was consigned, "S. O. notify Little Rock Grain Company, Little Rock, Arkansas."

The distance from Joplin, Missouri, to Little Rock, Arkansas, by the route which the car was to travel, that is, over defendant's road to Jonesboro and from there over the St. Louis Southwestern railroad (commonly spoken of as the Cotton Belt road), was about four hundred miles. A reasonable time for the transit would be from four to six days, and the car reached Little Rock, August 10, 1895.

The shippers had sold the corn to the Little Rock Grain Company for two hundred and sixty-eight dollars and twenty cents, and upon receiving said bill of lading from appellant's agent, they drew a draft through their bank at Joplin upon the Little Rock Grain Company for that amount. The draft was deposited in said bank at Joplin with the bill of lading attached and went through regular collection channels by way of Kansas City to Little Rock, where on August 9, 1895, it was presented by the clerk of the German National Bank in that city to the Little Rock Grain Company for acceptance. The drawee refused to accept the draft because the corn had not arrived; the clerk

thereupon protested the draft for nonacceptance for that reason, and notified plaintiff.

485 The draft was returned to plaintiff through the bank at Joplin and the protest fees, amounting to three dollars and forty-six cents, were charged to them. Plaintiff had defendant's agent trace the corn, and on August 13th, said agent (Cooley) received from the Cotton Belt agent at Little Rock a telegram which was at once shown to plaintiff, reading: "Car F. S. & M. 2194 arrived 10th; delivered Little Rock Grain Co., Aug. 12th." The same day (August 13th) plaintiff drew another draft on the grain company for the amount of the first one plus the protest fees and deposited it in the same Joplin bank with the same bill of lading attached. This draft on August 17, 1895, was presented by the same bank clerk at Little Rock to the grain company there for acceptance; thereupon the grain company telegraphed plaintiff: "Your draft with protest fees added is here. Is subject to protest. Will pay only invoice face. This ultimatum." The plaintiff having made no reply to the grain company refused to accept the draft because "the amount was not correct," and the bank clerk protested it and notified the plaintiff thereof.

The second draft with original bill of lading attached was returned through the same channels to the shippers, who kept the bill. They made no effort to secure the corn, gave no directions for its disposition, nor was the bill of lading ever presented to appellant or its connecting line, the Cotton Belt Railway Company, nor was any demand ever made by the shippers or anybody for them upon either of said railroad companies for the corn. Nor did they ever give the purchaser any chance to pay the price agreed on and get the corn; instead they held on to their shipper's order bill of lading and refused to give any directions for the disposal of the corn, though frequently asked to do so.

After the arrival of the corn at Little Rock the car was placed upon the warehouse track of the grain company where it was unloaded by that company (its identity being preserved) as a warehouseman under a general 486 bond given by the Cotton Belt Railway Company. A few days afterward the bill of lading not having been presented by the grain company, the Cotton Belt Company's agent at Little Rock demanded the surrender of the bill or of the corn; the bill of lading not being produced for the reasons already stated, the corn was at once reloaded into a car furnished by the Cotton Belt Company, being the identical

corn which plaintiff had shipped and in exactly the same condition as when it reached Little Rock, there being no claim or pretense that it had sustained any damage whatever.

On August 22, 1895, the shippers were asked by the Cotton Belt Company for directions as to the disposition of the corn, whereupon they replied: "Yours 1st. Have just notified Memphis road we would not accept car since it has been delivered once. Our draft now amounts to $275.12, and will take the matter up with G. F. A. Memphis road and get protection, and you to protect yourself had better wire authority to make draft at once. As to terms, etc., it is quite evident that we know as much, or more, about terms than you do about S. O. shipments, and advise you to act promptly in this matter before it is out of our reach."

Repeated demands were made by the Cotton Belt Company in correspondence with the shippers to induce them to receive the corn or direct its disposition, which they refused to do, and it was finally stored with a warehouseman at Little Rock and the shippers were advised of that fact and that it would still be delivered to them on presentation of the original bill of lading.

The grain was subsequently, about a year after its shipment and long after this action was begun, sold by the shippers to the highest bidder at Little Rock, the net proceeds of the sale, after deducting warehouse charges, amounting to one hundred and twenty-eight dollars and fifty cents. These charges were for storage at the rate of one-quarter of one cent per bushel per month, and were only for the charges of the second warehouseman.

487 February 22, 1896, this action was begun before a justice of the peace to recover the value of the corn at the selling price above stated, upon the ground that defendant had received the corn for shipment to the shippers at Little Rock, Arkansas, "and to there deliver it to said Marshall & Antles or their order, but said defendant company, its officers and agents, instead of so delivering said corn, wrongfully converted the same to their own use." From a judgment for plaintiff defendant appealed to the circuit court, where a jury was waived, and on trial a judgment rendered by that court in favor of defendant, from which plaintiff appealed to the Kansas City court of appeals, which reversed the judgment, remanding the cause, after which it was tried before the circuit court and a jury and a judgment rendered for plaintiff for one hundred and thirty-seven dollars

and seventy cents, from which this appeal has been prosecuted by defendant.

The appeal was taken to this court because constitutional and federal questions are claimed to be involved.

At the close of the evidence on the part of plaintiff, and again at the close of all the evidence, defendant asked an instruction in the nature of a demurrer to the evidence which was refused, and the action of the court in this regard is assigned for error. The argument is that since the contract of carriage expressed in the bill of lading was, on defendant's part, to carry only over its own line, as the alleged conversion (if there was any) occurred at Little Rock on the line of a connecting carrier, it was the act of that carrier; hence, there was no evidence of any failure on the part of defendant under the contract to discharge its duty to plaintiff. And that section 5222 of the Revised Statutes of 1899, when construed and applied to the bill of lading in evidence as the trial court construed and applied it, is repugnant to article 1, section 8 of the federal constitution, and denied the defendant the freedom of contracting in such matters. That section of the statute reads as follows:

488 "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad, or transportation company, through whose negligence the loss, damage, or injury may be sustained."

In support of this contention defendant relies upon Dimmitt v. Kansas City etc. Ry. Co., 103 Mo. 440, 15 S. W. 761, McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, and Kansas etc. R. R. Co. v. McCann, 174 U. S. 580, 19 Sup. Ct. Rep. 755, and says that in all these cases it was plainly intimated that, while the statute was not repugnant to the constitution as applied to the facts of the case then under consideration, it might be applied in such way

as to become so, by a construction which denied to an interstate carrier the right and power to limit its contract of carriage, and consequent liability in case of an interstate shipment to its own line. We think those cases were properly interpreted by the Kansas City court of appeals in the case of State Nat. Bank v. Chicago etc. Ry. Co., 72 Mo. App. 82, wherein it was said: "A carrier receiving freight destined beyond its own line may stipulate that it will not be liable for negligence of the connecting carrier if its contract of carriage is limited to the end of its own route. But if the receiving carrier's contract is to transport the freight to point of destination, it cannot so limit its liability, and must answer for the negligence [489] of the connecting carrier. Those cases further hold that the receiving carrier in receiving freight and issuing a bill of lading therefor to a point beyond its own line prima facie agrees to carry to such point, and to prevent such construction of the contract, it will be necessary that it stipulate it is only to carry to the end of its own line." That case was followed with approval in this case, Marshall v. Kansas City etc. Ry. Co., 74 Mo. App. 81.

Moreover, McCann's case was affirmed by the supreme court of the United States in 174 U. S. 580, 19 Sup. Ct. Rep. 755, wherein it was held that the statute as interpreted by this court in that case could not be held to be repugnant to the constitution of the United States.

It will be observed from the bill of lading that the point of destination to which the grain was to be shipped was left blank, hence there was no express agreement with respect thereto, but it was clearly shown by indorsement at the end of the bill of lading that the place to which it was to be and was in fact shipped was Little Rock, Arkansas. And defendant having received and issued a bill of lading for the corn to a point beyond its own line prima facie agreed to carry to such point in the absence of a stipulation that it was only to carry to the end of its own line. But defendant claims that, as it was expressly agreed by the bill of lading that its responsibility should not extend beyond its own line, it cannot be held liable for the negligence of the connecting carrier. There being no evidence to the contrary, it is clear, we think, that the contract was for a through shipment, and this being the case, could the defendant at the same time by contract exempt itself from liability on account of the negligence of the connecting carrier? In McCann v. Eddy, 133 Mo. 69, 33 S. W. 71, it was said: "We cannot, therefore, give such an interpretation to the statute as would permit

a carrier to contract for a through shipment and at the same time exempt [490] himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law which declares a conclusive liability in such case. The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well and declare a liability for negligence without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt, on the part of defendant, to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such a qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer."

In that case it is held that in a case where property is received by a carrier for transportation from one place to another, such carrier may be held liable for the negligence of any other carrier to which such property may be delivered, unless it limits its duty and obligation to transportation over its own route, which it may lawfully do. But that such carrier cannot contract for a through shipment, as in the case at bar, to a point beyond its line, and at the same time exempt itself from liability for the negligence of the connecting carrier which completes the transportation.

It was held in Kansas etc. R. R. Co. v. McCann, 174 U. S. 580, 19 Sup. Ct. Rep. 755, that the statute as interpreted by this court in the same case could not be repugnant to the constitution of the United States.

It is said that there was no conversion of the corn by defendant's connecting carrier and that the verdict should have been for defendant. The evidence, however, showed that Marshall & [491] Antles had sold the corn to the Little Rock Grain Company, and not having been paid for it, and not wishing the corn delivered without receiving pay, attached a sight draft to the bill of lading, and sent said draft with the bill of lading attached to a bank in Little Rock for collection from the Little Rock Grain Company, so that the grain company could not get the car of corn without paying the draft.

But when the car of corn arrived at Little Rock, the agent of the Cotton Belt line, which line of road the defendant selected as its connecting carrier to Little Rock, delivered the car of corn to the Little Rock Grain Company, when the Little Rock Grain Company did not hold the bill of lading for the same, said bill of lading having been attached to the sight draft which had not been taken up by the Little Rock Grain Company, the Little Rock Grain Company having refused to pay the draft.

The Cotton Belt road was protected by a bond of the Little Rock Grain Company, so that if it became liable on account of delivery without the bill of lading it would be indemnified.

After inquiries had been made of defendant railroad company, plaintiff was notified by the local agent of the defendant company that the corn had been delivered to the Little Rock Grain Company. They refused then to have anything further to do with the corn, which was afterward redelivered by the Little Rock Grain Company to the Cotton Belt Railroad Company, which company stored it in a public warehouse.

There can be no question but that the shipper of goods has the right to designate the consignee, or in other words, the person to whom they are to be delivered, and that the carrier is bound to obey the direction of the shipper, or to comply with the terms of his contract of shipment in this respect, and if he disobeys them he is liable as for a conversion: Wiggins Ferry Co. v. Chicago etc. Ry. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; Jeffersonville R. R. Co. v. White, 6 Bush, [492] 251. A misdelivery by a carrier of an article intrusted to him to be carried is a conversion: Claflin v. Boston etc. R. R. Co., 7 Allen, 341; Bishop on Noncontract Law, sec. 405. Nor does the fact that the railroad company offered to return the corn after it had been redelivered back again into the cars furnish any justification for the conversion, though it might be considered in mitigation of damages: Sparks v. Purdy, 11 Mo. 219.

A final contention is that the court erred in excluding competent and relevant testimony offered by defendant, and in admitting over defendant's objection incompetent and irrelevant testimony offered by plaintiff. The first contention is predicated on the fact that upon the cross-examination of plaintiff Marshall, who testified as a witness in behalf of plaintiff, defendant's attorney asked him if he was not notified from time to time, or if he did not know that the car of corn was still at Little Rock, at its final disposal. This was objected to by plaintiff's attorney as immaterial and the objection sustained.

The objection was, we think, well taken, for, as we have held, when the corn was once converted by defendant nothing that was thereafter done or offered to be done by defendant could have the effect of relieving it from its liability for the conversion.

Nor was the error committed for like reason in excluding evidence offered by defendant to the effect that it was customary for defendant's connecting line to store corn in a warehouse at Little Rock, awaiting the demand of the bill of lading. It was immaterial.

On the redirect examination of plaintiff Marshall, his attorney asked him what was meant by "free time" as used by railroads and shippers of grain. This question was objected to upon the ground that it was immaterial, but the objection was overruled and the witness answered. That this testimony was immaterial, and should not have been admitted, we think clear, but we are unable to see in what way the jury could have been [493] misled or the defendant prejudiced by it, and do not, therefore, think the judgment should be reversed upon that ground.

Our conclusion is that the judgment should be affirmed, and it is so ordered.

All concur.

Contracts Limiting the Liability of Carriers in the transportation of freight are discussed in the monographic note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74-134. See pages 129-134 of this note for a discussion of statutes prohibiting carriers from placing any limitation on their common-law liability. A reference to pages 133, 134, will show that such statutes, when attacked as unconstitutional, as applied to interstate shipments, have been upheld.

If a Carrier Delivers Goods to One not Entitled to them, he is liable as for a conversion: See the monographic note to Bolling v. Kirby, 24 Am. St. Rep. 816. Consult, also, Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; Midland Nat. Bank v. Missouri Pac. Ry. Co., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521; Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896. And if a carrier has once been guilty of conversion, no tender of the goods to the owner nor refusal by the owner to receive them will relieve the carrier from their subsequent loss: Railroad Co. v. O'Donnell, 49 Ohio St. 489, 34 Am. St. Rep. 579, 32 N. E. 476. See, on this point, the note to Bolling v. Kirby, 24 Am. St. Rep. 808-811.

ECKRICH v. ST. LOUIS TRANSIT COMPANY.

[176 Mo. 621, 75 S. W. 755.]

JURY.—The Essentials at the Common Law were, that a jury should be composed of twelve men, that they should be impartial, and that their verdict should be unanimous. (p. 525.)

JURY.—There were Two Kinds of Trial Juries known to the common law: the regular panel for the sitting or term of court, and the special jury. (p. 526.)

SPECIAL JURY.—At the Common Law and in Missouri since 1835, special juries have been provided for by law, and the sheriff has selected them, except since that date in cities of over one hundred thousand inhabitants, where the jury commissioner selects them. (p. 534.)

SPECIAL JURIES.—There is no Substantial Difference between the character of special juries at the common law and in Missouri. (p. 534.)

JURY TRIAL, Right to Inviolate.—The Provisions of the Constitutions of Missouri of 1820 and 1865 that the right of trial by jury shall remain inviolate, and the provision of the constitution of 1875, that the right as heretofore enjoyed shall remain inviolate, mean the right of trial by jury as it existed at the common law. (p. 534.)

JURY—Adoption of Common Law in Missouri.—When the act of 1816 was passed, adopting, as part of the law of Missouri, the common law of England and the statutes enacted prior to 4th James I, the common-law juries, regular and special, were adopted and became a part of the system of the law of that state and of the machinery of its courts. (p. 536.)

JURY.—There were in Missouri, as distinguished from common law, no juries prior to the constitution of 1820. (p. 537.)

JURY—Denial of Right to, by Imposing Costs of.—The fact that a statute requires a party who applies for a special jury to deposit the cost thereof, which places such jury out of the reach of a poor man, does not make the law obnoxious to the equality clause of the federal constitution. (p. 537.)

JURY.—The Provision of the Federal Constitution guaranteeing the preservation of the common-law right to trial by jury is a restriction on the general government only. (p. 537.)

SPECIAL JURY—Manner of Selection, When Constitutional. The fact that the sheriff in the country, and the jury commissioner in large cities, have power to select special juries, and that they are not drawn by lot, as the regular panel is, does not make the law so providing unconstitutional. (p. 537.)

Alfred Gfeller and George D. Reynolds, for the appellant.

Boyle, Priest & Lehmann and George W. Easley, for the respondent.

[527] MARSHALL, J. This is an action for personal injuries. When the case was set for trial in the circuit court, the

defendant obtained an order of court for a special jury, and under the order deposited in court the sum of seventy-five dollars to cover the cost thereof. When the case was called for trial and the special jury was called, the plaintiff challenged the array and filed the following motions in respect to which the following proceedings were had:

"Now come Peter Eckrich, by vocation a common laborer, a citizen of the United States, and residing within the jurisdiction of the state of Missouri, the plaintiff in the above-entitled cause, and moves the court to quash the venire for a special jury ordered issued in said cause by this court, upon motion of the defendant, and made returnable on the day set for trial of this cause, for the following reasons, to wit:

"1. The law and the established practice of this court, and the officers under which said venire for a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the constitution of the United States of America, and especially of section 1 of the fourteenth amendment thereof; because said law, and the practice of said court and its officers thereunder, abridges the privileges and immunities of the plaintiff as a citizen of the United States, and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri, and within its jurisdiction, the equal protection of the laws, in this:

628 "(a) Said law, and the practice of the court and its officers thereunder, commits to the unrestrained will of a single public officer, who holds an office not provided by the constitution of the state of Missouri, the power of selecting a jury in a manner contrary to the common law, and against the common right, as well as contrary to the general statutes of the state of Missouri.

"(b) It compels the plaintiff, and other persons similarly situated, to submit their causes to the exclusive determination of a jury not chosen indiscriminately from qualified jurors of the city of St. Louis, as all other jurors by law are required to be selected, but selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants and employers of labor generally, whose interests and bias are antagonistic to plaintiff, and other persons similarly situated, and it excludes from the panel laborers, mechanics and artisans and employés who have equal practical knowledge, and

have equal intelligence with the class above referred to, producing an unjust and illegal discrimination between citizens of the United States, and making an unequal and unfair class discrimination in the composition of the jury.

"2. Because the law and practice of this court, under which said venire for the special jury has been issued, is unconstitutional and repugnant to the letter and spirit of the constitution of the United States of America, and especially to the seventh amendment thereof, and the jury summoned to try this cause is not a common-law jury, as guaranteed to him by said amendment.

"3. Because the law and rules of practice of the court, under which said venire of a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the constitution of the state of Missouri, and especially article 2, section 10, thereof.

 "4. Because the law and rules of practice of the court, under which said venire for a special jury was issued and executed, is unconstitutional and repugnant to the letter and spirit of the constitution of the state of Missouri, and especially article 2, section 28; and the jury summoned to try this cause, is not a common-law jury, guaranteed to him by the constitution of the state of Missouri.

"5. Because said law, and the rules and practice of the court under which said venire for a special jury has been issued and executed, is unconstitutional and repugnant in letter and spirit to section 30, article 2 of the constitution of the state of Missouri; and that the jury summoned in this cause is so biased and prejudiced against plaintiff as to deprive him of due process of law.

"6. Because the statute under which the venire for a special jury issued in this cause, is so indefinite and uncertain, and conflicting with other statutes of the state of Missouri, as to render it null and void.

"7. Because the jury summoned to try this cause has not been summoned in accordance with the general laws of the state of Missouri, governing rules in civil causes."

After counsel had read the above motion to the court, the following took place in open court:

"Mr. Gfeller.—If it may please the court, I desire to introduce evidence in support of my motion to show the manner in which this jury has been selected and summoned.

"The Court.—In reference to the question of law, I don't see any necessity of taking any testimony. I will pass on that motion and overrule it.

"Mr. Gfeller.—Permit me to have the testimony of the jury commissioner introduced in support of the motion.

"The Court.—I don't see the necessity for that. The law defines his duties. You don't charge corruption [630] on his part, so I don't see any occasion for taking his testimony."

To which ruling of the court in refusing to hear evidence in support of and the overruling of said motion to quash said special venire, plaintiff's counsel then and there duly objected.

"Mr. Gfeller.—I desire to apply for a writ of prohibition in the supreme court of the state of Missouri, and if necessary, carry the case to the United States supreme court. For this reason I desire to introduce this testimony in order to show how special juries are selected and summoned.

"The Court.—I am giving you the benefit of the allegations stated in the motion as being true. Are you ready for trial in the case?

"Mr. Gfeller.—I am ready for trial.

"The Court.—Let the jury come forward.

"Mr. Lon O. Hocker (attorney for defendant).—An amended petition was filed on Saturday and I have not filed any pleading to it.

"Mr. Gfeller.—I am willing that the cause may be continued to a certain day, and not be tried on its merits until this question has been passed on by the higher courts.

"The Court.—The jury will be discharged until February 11th, to appear here at that time without further notice.

"Mr. Gfeller.—I desire to have your honor's decision embodied in the record. I understand if what is contained in this motion were true, you would overrule the motion anyway.

"The Court.—Yes.

"Mr. Gfeller.—I desire to have that embodied in the record."

Plaintiff properly saved exception to the ruling of the court.

Afterward, at the February term, 1901, of the court, on February 11th, the cause was again called [631] for trial, and the special jury selected by the jury commissioner under order of court of January 7th, made on motion of defendant, a list of which was theretofore returned into court, was called, the same having been duly summoned by the sheriff, and the following proceedings took place:

"Mr. Gfeller.—If the court please, I have presented an application for a writ of prohibition to the supreme court, and that court refused to grant it on the ground that plaintiff must come there either by appeal, or writ of error. I again ask your honor to quash the venire for the special jury ordered selected and summoned in this cause for the reasons already urged and for additional reasons stated in an additional motion to quash, which I ask leave to file and read.

"The Court.—You may file and read the motion.

" 'Plaintiff's counsel filed and read his second motion to quash the special venire of jurors called in this cause, which motion is in words and figures as follows (omitting caption):

" 'Now comes Peter Eckrich, a common laborer and without means, the plaintiff in the above-entitled cause, and again moves the court to quash the special jury venire ordered by this court, selected by the jury commissioner and summoned by the sheriff of the city of St. Louis, and from which a jury is to be selected to try this cause, for the following additional reasons, to wit:

" '1. Because the order of this court directing the jury commissioner to select said special venire does not state by what authority and under what statutes said order was made, nor how said venire is to be drawn and selected.

" '2. Because the order granting the defendant's application for a special jury has been made in pursuance of an established practice of the circuit court of the city of St. Louis according to which applications for special juries are granted only upon condition that [632] the applicant for such a jury deposit forthwith with the clerk of said court the sum of seventy-five dollars and from time to time such further sums as may be required to meet all expenses under such order, thus producing, in force and effect, an unjust and unlawful discrimination against plaintiff and those who lack the means and are unable to deposit such sum of money for a special jury, and granting undue, unjust and unlawful advantages and privileges to defendant in this cause and to those who are possessed of the means to enable them to comply with the rule and practice of the court, thereby obtaining for a money consideration a venire from which to select a jury to try their causes, entirely different and distinct from the venires provided for by the general statutes and laws of the state of Missouri governing jury trials, contrary to the letter and spirit of article 2, section 10 of the constitution of the state of Missouri, which provides that the courts of justice shall be open to every person, and certain remedy offered for every

injury to the person, property or character, and that right and justice should be administered without sale, denial or delay.

"'3. Because the order of this court granting defendant's application for a special jury upon condition that it deposit with the clerk of this court the sum of seventy-five dollars and such further sums as may be required, is unconstitutional, and repugnant to the letter and spirit of section 1 of the fourteenth amendment to the constitution of the United States in this: It abridges the privileges and immunities of plaintiff as a citizen of the United States and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri and residing within its jurisdiction, the equal protection of the law, in this: that defendant, itself a powerful corporation, employing a great force of laborers, by reason of its ability to deposit with the clerk the sum of seventy-five dollars, has obtained a venire for a [633] special jury from which to select twelve men to try this cause, who were not drawn indiscriminately from the names of the qualified jurors of the city of St. Louis, deposited in the jury wheel, as all other jurors by law are required to be drawn, but to the contrary, a venire selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants and employers of labor generally, and solely and exclusively from a class of men whose interests and bias are antagonistic to plaintiff, and that in selecting said venire, the jury commissioner purposely and intentionally excluded from the panel laborers, mechanics and artisans and employés, although they have equal intelligence with the class of men first above referred to, thus producing an unjust and illegal discrimination and class distinction between plaintiff and defendant as citizens of the United States, and making an unequal and unfair class discrimination in the composition of this jury.

"'4. Because the facts involved in this cause do not require trial by a special jury.'

"The Court.—I overrule your motion.

"To which ruling of the court in overruling said second motion to quash said special jury venire, plaintiff's counsel then and there duly excepted.

"Mr. Gfeller.—Plaintiff declines to proceed further in this cause.

"The Court.—If so, I dismiss this cause for failure to prosecute, at plaintiff's cost; it is so ordered. Mr. Sheriff, discharge

the special jury in the cause of Eckrich against St. Louis Transit Company from further service.

"To which order and ruling of the court in dismissing plaintiff's cause, plaintiff by his counsel then and there duly excepted."

Judgment of dismissal and for costs entered.

After proper steps taken, the plaintiff appealed.

[634] 1. The decisive question in this case is the constitutionality of the law allowing a special jury in civil cases, in cities having over one hundred thousand inhabitants, being section 6566, article 23, chapter 91 of the Revised Statutes of 1899, page 1553. That section is as follows: "In every city in the state of Missouri having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered, the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said court the names of the persons to be summoned for such special jury, and said officer shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party," etc.

The plaintiff's contention is that this law violates the seventh and fourteenth amendments to the constitution of the United States, and also sections 10, 28 and 30 of article 2 of the constitution of Missouri, and the two motions to quash the venire filed by the plaintiffs, and set out in full herein, specify the grounds and reasons upon which the contention is bottomed.

Counsel for plaintiff, in very comprehensive, strenuous and able briefs, have amplified their contention, so that their position may be summarized to be as follows:

1. The provision of section 28 of article 2 of the constitution of 1875, that, "the right of trial by [635] jury, as heretofore enjoyed, shall remain inviolate," and the provision of paragraph 17 of section 1 of article 1 of the constitution of 1865, "that the right of trial by jury shall remain inviolate," are mere continuations of, and must be construed in the light of the pro-

vision of section 8 of article 13 of the constitution of 1820, "that the right of trial by jury shall remain inviolate," and therefore a party litigant is entitled to a trial before such a jury as was authorized by the laws of Missouri at the date of the adoption of the constitution of 1820, and any law passed since that date authorizing a jury such as was not known to the law in 1820, is unconstitutional.

2. That the jury guaranteed by the constitution of 1820 was not such a jury as was known to the common law, but was such a jury as was known in Missouri under the territorial laws before the admission of Missouri into the Union as a state and before the adoption of the constitution of 1820, and that was such a jury as was authorized by the act of Congress known as the "organic law," approved June 4, 1812, prescribing the law for the government of Missouri Territory, section 11 whereof was as follows:

"That all free male white persons of the age of twenty-one years, who shall have resided one year in the said territory, and are not disqualified by any legal proceeding, shall be qualified to serve as grand or petit jurors in the courts of said territory; and they shall, until the general assembly thereof shall otherwise direct, be selected in such manner as the said courts shall respectively prescribe so as to be most conducive to an impartial trial, and least burdensome to the inhabitants of the said territory": Geyer's Digest, p. 34.

It is further contended by the plaintiff that by the territorial act of 1816, it was provided that: "The common law of England, which is of a general nature, and all statutes . . . . made prior to the fourth year [636] of James I, ... which common law and statutes are not contrary to the laws of this territory and not repugnant to or inconsistent with the constitution and laws of the United States," should be deemed a part of the law in Missouri, but as the common law in reference to juries is inconsistent with the law in Missouri prior to 1820, this feature of the common law never became a part of the law in Missouri.

It is further contended that prior to 1820 the only special jury that was known to the law in Missouri was that provided for by section 18 of chapter 93 of the act of August 20, 1813 (1 Terr. Laws 1804-24, p. 276), which prescribed that if a party to any pending suit made oath that he could not have a fair and impartial trial by a jury selected from the county wherein the court was sitting, the court should order a special jury to be summoned from an adjoining county.

Upon these predicates the contention is based that it was a Missouri jury and not a common-law jury that was guaranteed by the constitution of 1820, and that the subsequent constitutions were only intended as continuations of the provision of the constitution of 1820, and therefore it is still only such a jury as was authorized by the laws of Missouri prior to 1820, that is guaranteed or allowed by the constitution of 1875. And as such a special jury as is provided for by the section in question here (Rev. Stats. 1899, sec. 6566) was unauthorized by the constitution of 1820 it is therefore unauthorized by the constitution of 1875.

3. That section 6566 aforesaid violates the constitution of the United States in that it is such a jury as only a rich man can pay for, and therefore a poor man is denied the equal protection of the law.

4. That section 6566 violates section 10 of article 2 of the constitution of Missouri, which provides that: "The courts of justice shall be opened to every person, and certain remedy afforded for every injury to person, property or character, and that right and [637] justice should be administered without sale, denial or delay," in this, that a price beyond the reach of the poor man has been placed upon the enjoyment of the right to have a special jury, and therefore justice is sold.

5. That section 6566 violates the constitution of the United States and of Missouri, and is repugnant to the principles of justice, in this, that it allows one man—the jury commissioner—to select the jury, and thereby opens the door for a dishonest commissioner to "fix" any jury.

6. These postulates necessarily lead counsel to the necessity of challenging the correctness of what they term the dicta in the case of State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and to ask that what was there said by the majority of this court shall be overruled. Counsel are also forced to contend that the decisions of this court in Vaughn v. Scade, 30 Mo. 600, State v. Slover, 134 Mo. 607, 36 S. W. 50, and of both the majority and minority in State v. Hamey, 168 Mo. 167, 67 S. W. 620, are wrong, and that the only correct rule that has ever been announced in this state is that laid down in Bank of Missouri v. Anderson, 1 Mo. 244, and in the minority opinion in State v. Withrow, 133 Mo. 523, 34 S. W. 245, 36 S. W. 43.

It will be observed that the position taken by counsel for plaintiff is extreme and far-reaching, and if it is correct, the

result would be that every verdict that has been rendered by a special jury in this state since 1835, has been an unconstitutional verdict. The adoption of such a view would be most revolutionary, and would be a sad reflection upon the intelligence and legal learning of the legislators who have enacted the laws that have been on our statute books since 1835, and of the bar and bench that invoked and enforced such laws. Such a view ought not to be lightly considered or adopted. A retrospect, as brief as the subject permits, of the origin, growth, and present condition of the law in Missouri in regard to the right of trial by jury, is both necessary and pertinent.

638 At common law the sheriff selected and summoned the jury pursuant to a writ of venire facias issued out of king's bench, and if the sheriff was disqualified to act, the coroner acted, and if he was disqualified the court appointed two elisors to act: 12 Ency. of Pl. & Pr. 273. Originally, the sheriff used his own discretion as to the number to be summoned, and it was not until the statute of William II, chapter 38, that the number was limited to twenty-four: Thompson and Merriam on Juries, secs. 67, 79; 12 Ency. of Pl. & Pr. 273, 334, and cases in notes.

The essentials at common law were that the jury should be composed of twelve men, that they should be impartial, and that their verdict should be unanimous: State v. Slover, 134 Mo. 612, 36 S. W. 50; Thompson and Merriam on Juries, sec. 4.

There were two kinds of trial juries known to the common law, the regular panel for the sitting or term of court, and the special jury. Speaking of the latter kind, Thompson and Merriam on Juries, section 12 and 13, says, 'Special juries appear to have been first introduced in the king's bench, upon trials at bar, in causes of great consequence, or, as stated by Blackstone, 'when the causes were of too great nicety for the discussion of ordinary freeholders or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.' Later the practice seems to have become quite general in all the courts of allowing them, upon simple application in any civil case, as a matter of course, or at least they seem to have been easily procured when the granting was within the discretion of the court. . . . . In making up the list from which a special jury is to be struck, the officer charged with this duty is not obliged to take the names in any order in which they stand upon the register of jurors. He may make a selection of names of persons who, from their position

in the community, [639] are more likely to be possessed of that intelligence which is sought in a jury of this kind."

"By the English jury act [6 George IV, c. 50, sec. 34] the party applying for a special jury is fixed with the costs of the same, 'unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury'": Thompson and Merriam on Juries, sec. 13, par. 4, p. 15.

So a special or struck jury is allowed in nearly all of the states of the Union, "in order to obtain persons acquainted with the particular class of matters involved in the case," or when "it appeared necessary in order to obtain a fair trial, or when it appeared to be required by the 'importance or intricacy' of the case": 17 Am. & Eng. Ency. of Law, 2d ed., 1196, 1197; Thompson and Merriam on Juries, sec. 14, and statutes cited in notes.

The first law in Missouri relating to juries was the act of October 1, 1804 (1 Terr. Laws 1804-24, c. 13, sec. 13, p. 61), by which it was provided that in all criminal prosecutions "the trial shall be by a jury of twelve good and lawful men of the vicinage, and in civil cases the trial shall be by a jury, if either of the parties require it, and in all cases where neither of the parties shall require a jury, the law and the fact shall be determined and damages assessed by the court, and execution awarded as in other cases," etc. Section 15 of the act provided penalties for failure to attend when summoned as a juror, but there was no provision made as to how or by whom the jury should be selected or summoned, presumably leaving those matters as they had previously been regulated, however that was.

The next law in Missouri on this subject was the act of October 28, 1808 (1 Terr. Laws 1804-24, c. 60, p. 198), under which the judges of the courts of common pleas were required to select, from a list to be furnished by the collector of taxes of all free white male persons, [640] over twenty-one years old, whose taxable estate in real or personal property amounted to one hundred dollars, "sixty honest and intelligent householders, farmers, merchants and traders, inhabitants of this territory, not being clergymen, practitioners of physic, or attorneys of any court, sheriffs or their deputies, ferry-keepers, or constables, or such as be, or be reputed, persons of ill-fame, but altogether such as be of the best fame, reputation and un-

derstanding and credit in there [their] district." The names so selected were required to be written on separate pieces of paper of the same size, and the clerk was required, in the presence of the judges, the suitors and others attending the court, to draw by lot the names of the jurors to serve at the next term of the courts of common pleas in St. Louis, St. Genevieve, St. Charles, Cape Girardeau and New Madrid. The clerk was required to keep the pieces of paper on which such names were written in a box, and for the trial of all criminal cases, and of all civil suits in the general court, he was required to draw out twelve names, as the jury to serve therein: 1 Terr. Laws 1804-24, sec. 5, p. 200.

The next law in Missouri relating to juries was the act of October 25, 1810 (1 Terr. Laws 1804-24 p. 238; Geyer's Digest, 272). Section 1 of the act provided: "The several courts within this territory before whom juries are required, are hereby authorized to direct the respective sheriffs to summon a sufficient number of persons to perform the duties of jurors." Section 2 made every male resident of lawful age, except clergymen, physicians, attorneys, sheriffs, clerks of courts, ferry-keepers, constables and judges of courts of record, subject to jury duty, but required the courts to divide the task of sitting on juries as near as may be equally among all citizens, and in order to "obtain the impartial administration of justice" gave the court power to direct the sheriff "to avoid persons of ill-fame, or those who labor under the influence of either party." [641] The act of October 28, 1808, was expressly repealed.

Thus the sheriff was vested with the power of selecting and summoning the jury, with the qualification stated.

Then came the act of Congress of June 4, 1812 (1 Terr. Laws 1804-24, p. 12; Geyer's Digest, p. 34), by section 11 whereof, which is fully set out supra, it was provided that all free male white persons of the age of twenty-one years, who have resided in the territory one year, and are not disqualified by any legal proceeding, shall be qualified to serve as jurors, "and they shall until the general assembly thereof shall otherwise direct, be selected in such manner as the said courts shall, respectively, prescribe, so as to be most conducive to an impartial trial, and least burdensome to the inhabitants of the said territory."

Circuit courts were first established in Missouri by the act of January 4, 1815 (1 Terr. Laws 1804-24, p. 345), but nothing was said in that act about selecting jurors.

The act of January 21, 1816 (1 Terr. Laws 1804-24, p. 444), created the superior court of the territory. Section 6 of the act made it the duty of the judges of the court, or any two of them, to issue their precept directed to the sheriff or coroner, commanding him to summon sixty good and lawful men of his county, qualified by law, to serve as grand and traverse jurors at the next term of the superior court.

By the act of Congress of March 6, 1820, Missouri was admitted into the Union, and the consent of the people of Missouri, in convention assembled, was given thereto on July 19, 1820: 1 Terr. Laws 1804-24, p. 632.

Thereafter, the practice act of January 11, 1822 (1 Terr. Laws 1804-24, p. 841), was adopted, by the forty-second section whereof it was provided that any party to a suit might "require a trial by jury," but if [642] neither party required a jury the court should determine the law and the facts, or might refer the cause "to three or more indifferent and competent persons, whose report if approved by the court shall have the same effect as a verdict by a jury." Nothing was said about how the jury should be selected or summoned nor whether it should be a common or special jury that a party might "require."

The next act was approved December 28, 1826 (2 Terr. Laws 1824-36, p. 95), and was entitled "Jurors," the third section whereof required the party demanding a jury to deposit, at the time of the demand, the sum of twenty-five cents for each juror, which should be paid to the jurors as soon as the verdict was rendered, and which was taxed as costs against the losing party, but if the party made affidavit that he was unable to make such deposit, he should nevertheless be entitled to demand a jury, and the jury fee should be taxed as costs. Nothing was said in this act about who should select the jury nor the character of the jury.

Next came the act of March 17, 1835 (Rev. Stats. 1835, p. 342), which was entitled "Jurors." The first section of the act provided: "All courts before whom juries are required may order the sheriff or other officer to summon a sufficient number of jurors." The fourteenth section provided: "The court shall have power to order a special jury for the trial of any civil cause; in such case the sheriff shall summon eighteen

jurors, according to the order of the court, and make out and deliver to each party or his attorney a list of the jury so summoned, and each party shall have the right to strike off three of the names on such list." The fifteenth section provided that if a party should make affidavit that he could not have a fair and impartial jury to try the case on account of the unfriendliness or prejudice of the sheriff and coroner to him or his attorney, the court should appoint some disinterested and impartial [643] person, "who shall act as elisor, and proceed to summon a fair and impartial jury."

It will be noted how like to the common law this act was, and also that the first section is very similar to the act of 1810, supra, without the qualification as to the power of the sheriff in selecting the jury.

Sections 1 and 14 of the act of 1835 were carried almost literally into the revision of 1845: Rev. Stats. 1845, c. 91, pp. 627, 628.

Section 1 of the act of 1835 was carried literally also into the revision of 1855 and became section 2 of chapter 88: Rev. Stats. 1855, p. 910.

Section 14 of the act of 1835 relating to special juries was also carried into the revision of 1855, the only change being that the sheriff was required to summon twenty-four persons for such special jury: Rev. Stats. 1855, sec. 24, p. 912.

Sections 7 and 14 of the act of 1835 were also carried into the revision of 1865 and became sections 19 and 23 of chapter 146 of the General Statutes of 1865, page 599, with the change from eighteen to twenty-four above noted that was made by the revision of 1855.

The act of March 15, 1873 (Laws 1873, p. 46) entitled, "An act to provide for the manner of selecting and summoning grand and petit juries for courts of record," provided by section 2, that: "The county court of each county, at a term thereof, not less than thirty days before the commencement of the circuit court, or other court having civil and criminal jurisdiction, shall select the names of not less than one hundred and seventy-five persons having all the requisite qualifications of jurors; and the names of such persons shall be written on separate slips of paper, placed in a box to be provided for that purpose, and thoroughly intermixed; and the court, in selecting such names, shall select, as near as practicable, the same number from each township in the county, according to population." Section 3 provided: "The clerk of the county court, so

644 situated as to be unable to see the names on said slips shall then, in the presence of said court, draw, by lot, from said box, the names of eighteen persons, who shall serve as a grand jury of the county, at the next term of the court for which said jury is drawn; and said clerk shall then, in like manner, draw, by lot, from said box, the names of twenty-four persons, who shall serve as a petit jury at the next ensuing term of said court for which said petit jury is drawn."

Section 6 provided that if the regular panel be exhausted the court should order the sheriff, or other proper officer, to summon a sufficient number of other competent and qualified persons to complete the panel, and in executing the order it required the sheriff to summon "sober, intelligent and industrious persons to complete such panel and he shall not summon any vagrant, common idler or person having no visible means of support."

This act changed the method of selecting the regular panel of petit jurors and took away from the sheriff the power of selection that had been conferred upon him ever since the act of 1808, and vested that power in the county court, to be exercised by lot as described, and left the sheriff the power of selection only as to such jurors as became necessary after the regular panel was exhausted.

This act had no application, however, to special juries, and left their selection to the sheriff as it was provided for by section 23 of chapter 146 of the General Statutes 1865, page 599.

The aforesaid provisions of the act of 1873 as to the regular panel, were re-enacted by the act of March 28, 1874: Laws 1874, p. 97, secs. 2, 3, 7.

This act also left the provisions of the General Statutes of 1865 as to special juries unaffected.

The act of March 15, 1875 (Laws 1875, p. 80), providing for the selection of the regular panel of petit jurors, repealed the provisions of the act of 1873 and 645 1874, vesting the power of selection in the county court, with the power in the sheriff only to select further jurors after the regular panel was exhausted, and re-enacted, almost literally, the provisions of sections 1 and 14 of the act of 1835, and again vested the power of selection of both the regular panel and the special juries in the sheriff: Laws 1875, secs. 19, 20, 23, pp. 80, 81.

In the revision of 1879 the act of 1875 seems to have been entirely overlooked, and the provisions of the act of 1874 were carried into the revision of 1879, with certain amendments

thereto which are not important to this inquiry, and sections 2, 3, and 7 of the act of 1874 aforesaid, became sections 2784, 2785 and 2788 of chapter 43 of the Revised Statutes of 1879.

Thus the county courts were again given the power of selecting the regular panel, and the sheriff was given only the right to select those necessary to fill up after the regular panel was exhausted.

But a new section was added to the law and was numbered section 2802 to that chapter, which provided: "Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county, and triable by a jury, shall be entitled, as of course, to an order for a special venire on motion made therefor, three days before that on which the case is set for trial; but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed, as other costs against the losing party. This section shall apply to cities having over one hundred thousand inhabitants, as fully as to all other parts of the state."

Nothing is said in this section as to who shall select the special jury, nor is there any provision requiring a special jury to be drawn from the list of [646] jurors made up by the county court. Therefore section 23 of the act of 1875 (Laws 1875, p. 81) remained in force and the sheriff had to select them.

The last sentence of section 2802 of the Revised Statutes of 1879, making the new section apply to all cities of over one hundred thousand inhabitants, as well as to the whole state, was evidently added because of the act of April 11, 1879 (Laws 1879, p. 28), which provided that in all cities of this state having over one hundred thousand inhabitants the judges of the circuit and criminal courts should appoint a jury commissioner, who was required to make up a jury list, and put the names of the qualified jurors on separate slips of paper, in a wheel, and should draw a jury from the wheel, by lot, whenever the court ordered a jury: Laws 1879, p. 33, sec. 16.

This act said nothing about special juries. Hence the significance of the last sentence of section 2802 of the Revised Statutes of 1879.

The provisions of sections 2784, 2785, 2788 and 2802 of the Revised Statutes of 1879, were carried into the Revised Stat-

utes of 1889, and became sections 6067, 6068, 6073 and 6089, respectively, of the Revised Statutes of 1889, and those sections were in turn carried into the revision of 1899, and became sections 3769, 3770, 3775 and 3791 of the Revised Statutes of 1899.

The act of April 11, 1879, regulating juries in cities of over one hundred thousand inhabitants, was amended by the act of March 17, 1885 (Laws 1885, p. 74), which provided for special juries in such cities. This act is like section 2802 of the Revised Statutes of 1879, and in addition made sections 17 to 25 of the act of April 11, 1879, in relation to the summoning and service of common jurors, applicable also to special juries. This act passed into the Revised Statutes of 1889 and became section 29 of article 21 of the appendix to volume 2, at page 2169 of the Revised Statutes of 1889. The balance of that article being the act of April 11, 1879, aforesaid. This act passed [647] also into the revision of 1899 and became article 23 of chapter 91 of the Revised Statutes of 1899, the act of 1885 aforesaid relating to special juries in cities of over one hundred thousand becoming section 6566 of the Revised Statutes of 1899, which is the section whose constitutionality is challenged in this case, and being section 29 of article 21 of the appendix to the Revised Statutes of 1889, which is set out in full in State v. Withrow, 133 Mo. 511, 34 S. W. 245, 36 S. W. 43, and which underwent adjudication in that case.

Thus it appears that from 1808 to 1873 the sheriff was vested with the power of selecting all juries regular as well as special; that by the acts of 1873 and 1874 the power to select regular jurors was transferred from the sheriff to the county courts, but the provisions of the General Statutes of 1865 (section 23 of chapter 146) which vested in the sheriff the power to select special jurors, remained in full force; that the act of 1875 again placed the power of selection of both regular and special juries in the sheriff; that the revision of 1879 gave the power to select the regular panel to the county court, and added a new section (2802) providing for special juries, but did not specify who should select them; that the same is true of the revisions of 1889 and 1899; that the act of 1879 provided for the appointment of a jury commissioner in all cities having over one hundred thousand inhabitants, and prescribed for his making up a jury list and drawing the regular panel from a wheel, nothing being said about special juries; that the act of 1885, which became section 29 of article 21 of the ap-

pendix to the Revised Statutes of 1889, and afterward became section 6566 of the Revised Statutes of 1899, relating to special juries in cities of over one hundred thousand inhabitants, required the jury commissioner in such cities to select the special jurors, and that under the decision of this court in State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, the jury commissioner was not required to draw the special jury from the wheel, by lot, but had [648] a right to select them from the list of qualified jurors that he was required by law to keep.

So that the power to select special juries is and has always been vested in the sheriff in all parts of the state outside of cities of over one hundred thousand inhabitants, and inside of such cities it is and ever since 1885 has been vested in the jury commissioner.

It thus appears that at common law and in Missouri from 1835 to this date special juries have been provided for by law, and that the sheriff always has selected them, except since 1885 in cities of over one hundred thousand inhabitants, where the jury commissioner selects them.

There is no substantial difference between the character of special juries at common law and in Missouri.

This court has uniformly held that the provisions of the constitutions of 1820 and 1865 that the right of trial by jury shall remain inviolate, and the provision of the constitution of 1875 that the right of trial by jury as heretofore enjoyed shall remain inviolate, mean the right of trial by jury as it existed at common law.

In Vaughn v. Scade, 30 Mo. 600, Scott, J., said: "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted into our Bill of Rights. Of course, the nonessentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we have derived it."

The same rule was laid down by Sherwood, J., speaking for the majority of the court in State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and by Gantt, J., in State v. Slover, 134 Mo. 607, 36 S. W. 50, and by Gantt, J., speaking for the majority of the court in State v. Hamey, 168 Mo. 167, 67 S. W. 620.

The only utterances from this court or any of its [649] members to the contrary are what was said by McGirk, C. J., in Bank of Missouri v. Anderson, 1 Mo. 244, by Barclay, J., in his dissenting opinion in State v. Withrow, 133 Mo. 523, 34 S. W. 245, 36 S. W. 43, and by Sherwood, J. (in which the writer hereof concurred), in the dissenting opinion in State v. Hamey, 168 Mo. 204, 67 S. W. 620.

Judges McGirk and Barclay agree with the contention of the plaintiff herein that the constitution of 1820 does not guarantee a common-law jury, but only such a jury as was prescribed by the territorial laws of Missouri prior to the adoption of the constitution of 1820, and that the only special jury that was spoken of in those laws was a special jury called from an adjoining county, when a party litigant disqualified, by affidavit, the people of the county in which the court was sitting.

The dissenting opinion in State v. Hamey, 168 Mo. 204, 67 S. W. 620, held that the constitution of 1875 was an original, organic instrument, and not a mere continuation of the constitution of 1820, and that the provision that the right of trial by jury as heretofore enjoyed should remain inviolate meant as that right was enjoyed according to the laws of the state of Missouri, which included the common law and the English statutes enacted prior to the fourth year of James I, except as modified by our statute, and was not limited to the right of trial by jury as it was known to the common law: Creve Coeur Lake Ice Co. v. Tamm, 138 Mo. 388, 39 S. W. 791. See, also, to the same effect Perry v. State, 9 Wis. 19. But so far as the case at bar is concerned, there is no difference of opinion under either the majority or the minority opinion in the Hamey case. For special juries were known to the common law, and were selected by the sheriff or the coroner or two elisors, and special juries have been provided for by the laws of Missouri, in express terms, ever since the act of 1835, and in the country they are selected by the sheriff, and in cities of over one hundred thousand inhabitants they are selected by the jury commissioner.

[650] In England under the statute of 6 George IV, chapter 50, section 34, the cost of the special jury is taxed against the party applying for it, unless the trial judge after the trial certifies that it was a proper case for a special jury, and the same has been substantially the law in Missouri since 1885. Under section 2802 of the Revised Statutes of 1879, the party

applying for the special jury was required to pay the costs thereof, irrespective of the result. Similar provisions requiring the applying party to pay for the special jury are also contained in the laws of Delaware (Del. Rev. Stats. 1874, c. 109, sec. 18); Indiana (2 Ind. Rev. Stats. 1878, p. 159, sec. 1, note); Ohio (Ohio Rev. Stats. 1880, sec. 5188); New York (N. Y. Code Rem. Jus. 1876, sec. 1069); Michigan (Mich. Comp. Laws 1871, sec. 6011); and New Jersey (N. J. Rev. Stats. 1877, p. 528, sec. 26).

"The power of the legislature to require payment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall constitute a waiver of the jury, is undoubted": 12 Ency. of Pl. & Pr. 249.

The plaintiff, however, attempts to break the connection between the common-law right of trial by jury and the right of trial by jury in Missouri since 1835, by invoking the act of Congress of June 4, 1812, and by saying that there have been no lawful special juries in Missouri since 1835, because all of the laws authorizing them were violative of the constitution of 1820.

The act of Congress of June 4, 1812, simply prescribed the qualifications for jurors (which was evidently intended to nullify the territorial act of Missouri of 1808 prescribing a property qualification for jurors, but which act, as already herein pointed out, was repealed by the territorial act of 1810), and then provided that until the general assembly of the territory of Missouri should otherwise direct, the jurors should be selected in such manner as the courts might prescribe.

651 It will be easily and readily seen that this act was not intended to have the effect of establishing a new jury system nor of abolishing the special juries known to the common law, any more than of abolishing any other kind of a jury that was known to the common law. The territorial laws enacted prior to 1820 are in the same condition. They simply provided that a party should be entitled to a trial by jury and when a jury was demanded the court should order the sheriff to summon one. No particular kind of a jury was specified, and no intimation can be gleaned from the act of Congress or from these territorial laws that any other kind of a jury than such a jury as was known at common law was intended. That was the only kind of a jury the fathers of our country knew or had any respect for.

Therefore when the act of 1816 was passed, adopting the common law of England and the statutes of England passed prior to 4 James I, as a part of the law of Missouri, the common-law juries, regular and special, were adopted and became a part of the system of our laws and of the machinery of our courts.

This being true they were the kinds of juries that the constitution of 1820 guaranteed. There were no Missouri juries, as distinguished from common-law juries, prior to the adoption of the constitution of 1820, and, therefore, the foundation of the plaintiff's whole contention is untenable.

The fact that a party applying for a special jury is required to deposit the cost thereof and that it puts it out of the reach of a poor man to have a special jury, does not make the law obnoxious to the federal constitution.

"The preservation of the common-law right to trial by jury in both civil and criminal cases is guaranteed by the federal constitution, as well as by the fundamental law of the several states. It is well settled that the federal provision is a restriction only on the general government and its officers, and the states may constitutionally [652] abolish, alter or amend the existing right of trial by jury": 6 Am. & Eng. Ency. of Law, 2d ed., p. 974, and cases cited in notes.

The requirement of such a deposit no more violates the equality clause of the federal constitution than the fact that a rich man can employ the highest price lawyers, while the poor man can only afford to employ the lower price lawyers violates the constitutional guaranty that a man shall be entitled to defend by himself or by counsel.

The law furnishes the jury to every man on the same terms. The inequality consists in the unequal financial ability of the parties to avail themselves of the benefits of the law.

Neither does the fact that the sheriff in the country or the jury commissioners in the large cities have the power to select the special jury, and that they are not drawn by lot, as the regular panel is, make the law unconstitutional. Such matters depend wholly upon the legislative will. The power of selection must be lodged somewhere, in one or more persons, and it is for the legislative wisdom to provide whether the power shall be vested in the sheriff, as it was at common law and is in Missouri outside of the large cities, or in a jury commissioner in the large cities, or in a body composed of more than one.

Experience does not justify the fear expressed by the plaintiff of having juries "fixed" because the power is vested in a single officer, nor does the selection by the officer and not by chance or lot make the law unconstitutional: Perry v. State, 9 Wis. 19.

Special juries are allowed by the laws of the United States in the federal courts. Section 805 of the United States Compiled Statutes of 1901, volume 1, page 626, provides: "When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states."

653 These considerations show that the judgment of the circuit court is right and it is therefore affirmed.

All concur, except Robinson, J., absent.

CONDITIONS AND RESTRICTIONS WHICH THE LEGISLATURE MAY IMPOSE ON THE RIGHT OF TRIAL BY JURY.*

I. Power to Make Reasonable Regulations.
II. Prepayment or Deposit of Jury Fees.
III. Requirement of Bond or Recognizance.
  a. In Criminal Cases.
  b. In Civil Cases.
  c. As Condition Precedent to Right of Appeal.
IV. Requirement of Oath or Affidavit of Defense.
V. Demand of Trial by Jury.

I. Power to Make Reasonable Regulations.

The constitutions both of the United States and of the several states provide in substance that the right to trial by jury, both in criminal and civil actions shall remain inviolate. The exercise of this right may, however, be regulated by legislation: Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; State v. Griffin, 66 N. H. 326, 29 Atl. 414; and the making of reasonable regulations and conditions in regard to the enjoyment of the right is not a denial or impairment thereof: Conneau v. Geis, 73 Cal. 176, 2 Am. St. Rep. 785, 14 Pac. 580; Curtis v. Gill, 34 Conn. 49; Guile v. Brown, 38 Conn. 237; Matthews v. Tripp, 12 R. I. 259. "A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations, as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation, made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited, because it increases the

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*REFERENCE TO MONOGRAPHIC NOTE.

How far the legislature may regulate right of trial by jury: 58 Am. Dec. 791.

burden or expense of the litigating parties": Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186. An act making trial by jury more difficult to obtain than public necessity requires is unconstitutional: Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786.

In Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248, speaking of a statute requiring the performance of certain conditions precedent to a right to litigate a matter, the court said: "These terms may be onerous, but this is purely a question of expediency, and one which must, from its very nature, address itself exclusively to the lawmaker. And it is difficult to prescribe limits to the power of the legislature, in this respect. Cases might arise which would authorize that body to go very far in disregarding the rules and regulations which are ordinarily observed in the enactment of a law for the assertion and defense of rights. There is no invasion or infringement of the constitution so long as trial by jury is not directly or indirectly abolished. I repeat, it is impossible to say at what point the legislature ought to stop; and if undertaken to be said by the courts, it must be at some point of great excess, that such a stand can be made."

From the very nature of the case no definite rule can be laid down that will be a guide in all cases to determine what will and what will not impair the right; and every case must depend on its own circumstances: In re Marron, 60 Vt. 199, 12 Atl. 523.

II. Prepayment or Deposit of Jury Fees.

Statutes providing that the party demanding a jury must prepay or deposit in court the fees therefor, that a failure to do so shall constitute a waiver of the right, and that the amount so paid shall be taxed as costs against the losing party are generally held constitutional, as imposing the performance of a valid and reasonable condition: Venine v. Archibald, 3 Colo. 163; Adae v. Zangs, 41 Iowa, 536; Little v. McGuire, 43 Iowa, 447; Conners v. Burlington etc. Ry. Co., 74 Iowa, 383, 37 N. W. 966; Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169; McGeagh v. Nordberg, 53 Minn. 235, 55 N. W. 117; Vierling v. Stifel Brewing Co., 15 Mo. App. 125; State v. Neterer (Wash.), 74 Pac. 668. In Adams v. Corriston, 7 Minn. 456, it is said: "The objection to the jury fee we do not think is well taken. It is altogether too broad. It is not that the fee is so unreasonably high as to impede the due administration of justice, but because a fee is charged at all. We can see no valid objection to a reasonable fee of this kind. The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice. And that a party who demands a trial by jury should be required to advance a small jury fee, whether it is

considered as a tax on litigation, or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection, than is the requirement that the fees of the clerk, sheriff, and other officers, shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price,' there is an end to all fees, from the issuing of the summons to the entry of satisfaction of the judgment.''

The reasonableness of the amount charged is a matter resting in the discretion of the legislature, and courts will not interfere unless the fixed fee should amount to a practical prohibition of the right: Venine v. Archibald, 3 Colo. 163.

The Tennessee court holds that a statute providing that jury fees shall be taxed the same as other legal costs is unconstitutional as destroying the fairness and impartiality of the jury by making it to their interest to find for an insolvent party rather than a solvent, in order to secure for themselves their fees: Neely v. State, 63 Tenn. (4 Baxt.) 174; Gribble v. Wilson, 101 Tenn. 612, 49 S. W. 736.

A statute providing that whenever a new trial shall be ordered, either by the appellate or the trial court, the latter court shall have power to stay further proceedings until the costs then incurred shall be paid, is not unconstitutional as denying the right of trial by jury: Knee v. Baltimore etc. Ry. Co., 87 Md. 623, 40 Atl. 890; affirming 83 Md. 77, 34 Atl. 252.

III. Requirement of Bond or Recognizance.

a. In Criminal Cases.—The requirement that a bond be given before a jury trial will be allowed has often been before the courts and its validity passed on. In Greene v. Briggs, 1 Curt. 311, Fed. Cas. No. 5764, the question presented was whether in a criminal suit such security could be required, the offense being the unauthorized sale of intoxicating liquors. Judge Curtis there said: ''It will be seen that, in order to obtain a trial by jury, the party must give security, in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs against him. . . . . To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and, in my opinion, it is not only essentially unjust, but in conflict with that clause of the constitution which secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. Natural right requires that no man should be punished for an offense until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment, upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed, by all just minds,

as tyrannical; for it would treat the innocent, who were unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends." An act providing that in the event a jury trial is demanded, the defendant is required to give bond for his appearance at the jury term of the county court, does not impair the right of trial by jury, the giving of a bond not being a condition precedent in any case to having such a trial. "If a defendant demands a jury, but is unable to give bail for his appearance at the ensuing jury term, he stands committed, but is none the less entitled to be tried by a jury in accordance with his demand when such jury term is held": Howard v. State, 128 Ala. 43, 29 South. 580.

As to statutes requiring the giving of a bond on appeal, where trial by jury can be had only in the appellate court, see III, c, herein.

b. In Civil Cases.—A statute providing for a jury of six in cases of summary process, and requiring the party moving for a jury to give a recognizance with surety for all costs in case of a final adverse judgment, is valid: Miller v. Lampson, 66 Conn. 432, 34 Atl. 79. But where the defendant is required to give a bond with security, to the plaintiff, in double the amount claimed, conditioned for the payment of the eventual condemnation money and all costs thereon, such condition is void: Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178. In Edwards v. Elliott, 36 N. J. L. 449, 13 Am. Rep. 463, it was held a reasonable regulation to require a bond for the discharge of property from a lien, the party then having his trial by jury upon the issue, whether he was a debtor or not.

Where a statute authorizing a change of venue in civil actions makes it incumbent upon the party applying therefor to pay the costs thereof within ten days after the order directing the change, and further provides that the action shall be deemed abandoned unless within that time the applicant shall give a bond to the opposite party to the effect that he will pay all the costs that may be adjudged against him, it is valid and does not deny the constitutional right of trial by jury: Barkwell v. Chatterton, 4 Wyo. 307, 33 Pac. 940.

c. As Condition Precedent to Right of Appeal.—The right to trial by jury is usually considered not impaired where, though no jury be allowed in the court in which the action was originally tried, an appeal lies to a court in which a jury trial may be had: Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; Steuart v. City of Baltimore, 7 Md. 500; Morford v. Barnes, 16 Tenn. (8 Yerg.) 444.

A condition that the appellant pay the costs or give a bond therefor has been generally upheld as reasonable, and is not considered as imposing an onerous burden upon the right to trial by jury: In

re Kinsel, 64 Kan. 1, 67 Pac. 634; Hapgood v. Doherty, 74 Mass. (8 Gray) 373; State v. Griffin, 66 N. H. 326, 29 Atl. 414; Reckner v. Warner, 22 Ohio St. 275; McDonald v. Schell, 6 Serg. & R. 240; Littlefield v. Peckham, 1 R. I. 500; Beasley v. Town of Beckley, 28 W. Va. 81; and the same holds good where it is made the duty of the party appealing to procure copies of appeal at his own expense: In re Marron, 60 Vt. 199, 12 Atl. 523. In State v. Brennan's Liquors, 25 Conn. 278, it was held that the fact that the justice might in effect prevent an appeal, by requiring a bond of an exorbitant amount was no argument to prove the statute unconstitutional.

So a statute does not impair the right to trial by jury, which gives an absolute right of appeal, the only condition being that the appellant give bail for his appearance, or, in default thereof, be committed to jail so as to be ready at the trial: Jones v. Robbins, 74 Mass. (8 Gray) 329; and where an act provides that if he fails to prosecute his appeal, he shall be defaulted on his recognizance and sentence be awarded against him, it is constitutional: Commonwealth v. Whitney, 108 Mass. 5.

In Reeves v. State, 96 Ala. 33, 11 South. 296, it was held that where a jury could be had only on appeal, which could not be obtained unless the appellant entered into a bond with two or more sufficient sureties, it was violative of the constitutional provision, the court quoting with approval from State v. Everett, 14 Minn. 439, where the exercise of the right was conditional upon the defendant entering into a recognizance with one or more sureties, as follows: "It is contended that the defendant's constitutional right to a trial by jury was not violated, because, although he was, in the first instance, tried by a jury of six men, he had the right of appeal to the district court, where it was his privilege to be tried by a jury of twelve men. If this right of appeal is so absolute, unqualified and unfettered, that it, together with the right of trial by jury, are secured to every man who demands an appeal, we are of opinion that the requirement of the constitution is satisfied. But these rights must be secured. They must not be made to depend upon a condition with which the party prosecuted may or may not be able to comply."

A statute requiring the recognizance on an appeal from a conviction for unlawfully selling intoxicating liquors to be conditioned for the payment of such fine and costs as may be imposed, if the case should be determined against the appellant, is an unreasonable restriction on the right of appeal, impairing the right of trial by jury: In re Jahn, 55 Kan. 694, 41 Pac. 956, in which case the court said: "In McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516, it was held that such a provision as the foregoing, coupled with a further condition that the defendant must pay all costs accrued in the police court before the appeal should be perfected, constituted unreasonable restrictions upon the right of appeal; and we think it unreasonable to impose the condition for the payment of the fine

and costs if the case should be determined against the appellant, and that the recognizance should provide for nothing more than the appearance of the appellant before the district court of the county on the first day of the next term thereof, which, of course, implies that he will remain until his case is called and disposed of. Almost any man can obtain security for his appearance in a case where he is charged only with a misdemeanor, but it is very different when a neighbor is asked to become security for the payment of a fine, even upon a contingency, after it has been once imposed."

A statute imposing a double penalty on the appellant in case he be convicted by a jury in the appellate court is unconstitutional, as it would deter those convicted, even though innocent, from appealing and running the risk of a double penalty, thus imposing an unreasonable restriction: State v. Gurney, 37 Me. 156, 58 Am. Dec. 782.

Where it is provided that a tenant, under the landlord and tenant act, can have the benefit of a jury trial on appeal, only by giving security not merely to prosecute his appeal, but also to pay rent and damages for the detention of the land, his constitutional right of trial by jury is infringed: Perkins v. Towle, 58 N. H. 425.

Another condition precedent to the right of appeal, by which alone a jury trial may be had, which has been condemned as unconstitutional, is the requirement that before his appeal shall be allowed, the appellant shall give a bond with sureties not to violate any provisions of the act under which he was convicted during the pendency of the appeal: Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786; Saco v. Woodsum, 39 Me. 258; In re Liquors of McSorley, 15 R. I. 608, 10 Atl. 659.

IV. Requirement of Oath or Affidavit of Defense.

A law requiring that an affidavit of defense be made by the defendant before a jury trial may be had is valid: Dortic v. Lockwood, 61 Ga. 293; Hunt v. Lucas, 99 Mass. 404; Lawrance v. Borm, 86 Pa. St. 225; Randall v. Weld, 86 Pa. St. 357; and see Hobbs v. Dougherty County, 98 Ga. 574, 25 S. E. 579. So where a statute provides that if a railroad company sue for installments of stock, it need not prove such subscription to have been made, unless the defendant shall deny the subscription by plea or answer, verified by affidavit, it is not an invasion of the right of trial by jury: Thigpen v. Mississippi Cent. R. Co., 32 Miss. 347.

A requirement that an appellant make oath that he believes injustice had been done him, and that the appeal was not made for the purpose of delay does not clog the appeal with an onerous restriction: Biddle v. Commonwealth, 13 Serg. & R. 405, the court saying: "This is no more than a wholesale regulation; the object, of course, is to administer justice, and no man has a right to complain because he is refused an appeal intended for the purpose of delay,

or in a case in which he does not think that he has suffered injustice. It might as well be said that the trial by jury was attacked by a law which should forbid a defendant to put in a dilatory plea, or to plead non est factum, in an action of debt on a bond, without swearing that he believed the matter of the plea to be true. Laws such as these promote justice, and leave the substance of the trial by jury unimpaired, and that is all which is required by these expressions in the constitution that 'trial by jury shall be as heretofore.' ''

Where a plaintiff has invoked the protection of the statute relieving her from the requirement of giving security for costs, on account of poverty, she is bound by its provisions requiring a dismissal of the action by the court, if the allegation of poverty be found false, and cannot object that she is deprived of the right to trial by jury: Woods v. Bailey, 122 Fed. 967.

V. Demand of Trial by Jury.

It is competent for the legislature to enact a law providing that in civil actions a party shall not be entitled to trial by jury, unless he files, within the time therein prescribed, a notice that he desires it, such being only a reasonable regulation: McKay v. Fair Haven etc. R. Co., 75 Conn. 608, 54 Atl. 923; Foster v. Morse, 132 Mass. 354, 42 Am. Rep. 438; Garrison v. Hollins, 70 Tenn. (2 Lea) 684.

CASES

IN THE

SUPREME COURT

OF

MONTANA.

LESS v. CITY OF BUTTE.

[28 Mont. 27, 72 Pac. 140.]

EMINENT DOMAIN—Taking or Damaging Property for a Public Use, What is.—Under a constitution providing that property shall not be taken or damaged for a public use without just compensation, it is not necessary that there be any physical invasion of the individual's property to entitle him to compensation. (pp. 546, 547.)

PUBLIC STREETS—Damages for Grading to the First Grade Established.—Under a constitution providing that private property shall not be taken or damaged for a public use without compensation being first made to, or paid into court for, the owner, a recovery may be had for injuries received from the grading of a public street to the first and only grade established thereon. The constitution does not distinguish between the first and subsequently established grades. (p. 547.)

CONSTITUTIONAL LAW—Provisions, When Self-executing. A provision in a state constitution declaring that private property shall not be taken or damaged for a public use without just compensation is self-executing, and requires no legislation for its aid. (p. 548.)

A MUNICIPAL CORPORATION is Liable to a Property Owner for the Damages Resulting from Grading a Street in front of his lot, if the constitution of the state provides that private property shall not be taken or damaged for a public use without just compensation. (p. 548.)

Action to recover damages alleged to have been suffered by the plaintiff from the grading in front of his lot of a public street by order of the municipal corporation. The defendant moved for a nonsuit on the ground that the grade of the street adjoining the property of the plaintiff was the first and only grade thereof, and that the defendant, therefore, had the right

to establish the grade and reduce the street in conformity therewith. The motion was denied and judgment given for the plaintiff for the amount prayed for in his complaint, and the defendant appealed.

Edwin M. Lamb, for the appellant.

McHatton & Cotter, for the respondent.

[31] CALLAWAY, C. By the common law municipal corporations were not held liable for consequential damages resulting to property owners by reason of changes in street grades. The municipal authorities might change or alter the grades of public thoroughfares at will, and the adjoining owners had no redress. It was considered that, public improvements being for the good of the body politic, and always being in contemplation, the individual purchased his city or town property charged with knowledge that changes might be made as required by public necessity and convenience. So, too, when one platted a townsite, and dedicated certain portions thereof to the public for streets, he and his grantees were presumed to contemplate the changes which would necessarily result from public improvements. The rule damnum absque injuria was held to apply to all such cases, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Such is the doctrine asserted in Callender v. Marsh, 1 Pick. 418, and other cases cited by appellant.

The framers of our constitution abrogated this harsh rule by section 14, article 3, which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." It seems very clear to us that this section was [32] drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain. It overturns the doctrine that one owning city or town property must continually live in dread of the changing whims of successive boards of aldermen. Constitutions which provide that "private property shall not be taken for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only. Under constitutions which provide that property shall not be "taken or damaged" it is universally held that "it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation": Root v.

Butte etc. Ry. Co., 20 Mont. 354, 51 Pac. 155, and cases cited. The owner of a city lot has "a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street": Bohm v. Metropolitan El. Ry. Co., 129 N. Y. 576, 29 N. E. 802. "These easements are property, protected by the constitution from being taken or damaged without just compensation": Root v. Butte etc. Ry. Co., 20 Mont. 354, 51 Pac. 155; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820; Eachus v. Los Angeles Consol. El. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Rigney v. City of Chicago, 102 Ill. 64; Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313; Lewis v. City of Seattle, 5 Wash. 741, 32 Pac. 794; Hickman v. City of Kansas, 120 Mo. 110, 41 Am. St. Rep. 684, 25 S. W. 225; City of Fort Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; Harmon v. City of Omaha, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; Schaller v. City of Omaha, 23 Neb. 325, 36 N. W. 533. Moreover, it may frequently occur that "the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property": City of Atlanta v. Green, 67 Ga. 386.

But the appellant insists that it should not be held liable in this action for the reasons stated in its motion for a nonsuit.

[33] The first point is that the appellant cannot be held liable because the grade complained of is "the first and only grade ever established on Broadway street." The constitution does not distinguish between the first grade and subsequent ones. It provides against the damage occasioned in either case: Searle v. City of Lead, 10 S. Dak. 312, 73 N. W. 101; City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146; Eachus v. Los Angeles Consol. El. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750. The mischief to be remedied may be greatest in the first instance: McCall v. Village of Saratoga Springs, 56 Hun, 639, 9 N. Y. Supp. 170, 121 N. Y. 704, 24 N. E. 1100. The first grade of Broadway street was that provided by nature, and the alteration made by appellant was as much a change of grade as if the change had been made from a grade previously established by the authorities: Hendrick's Appeal, 103 Pa. St. 358; O'Brien v. Philadelphia, 150 Pa. St. 589, 30 Am. St. Rep. 832, 24 Atl. 1047; McCall v. Village of Saratoga Springs, 56 Hun, 639, 9 N. Y. Supp. 170, 121 N. Y. 704. 24 N. E. 1100; Blair v. City of Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341.

As to whether the appellant is liable "under the laws (statutes) of Montana in force at the time" is wholly immaterial. Section 14, article 3, of the constitution, is both mandatory and prohibitory. It is self-executing, and requires no legislation to rouse it from dormancy: Searle v. City of Lead, 10 S. Dak. 312, 73 N. W. 101; Hickman v. City of Kansas, 120 Mo. 110, 41 Am. St. Rep. 684, 25 S. W. 225; Harmon v. City of Omaha, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503.

While it is doubtless true that the constitution does not authorize a remedy for every diminution in the value of property which is caused by public improvement, the damages for which compensation is to be made being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment (Eachus v. Los Angeles Consol. El. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750), in the case at bar it is practically conceded that respondent is entitled to damages in the amount of the judgment rendered provided the appellant is liable at all.

We think the operation of this section of the constitution ought not to be restricted. The declarations of constitutions are placed therein to be obeyed, and are not to be "frittered away by construction." In McElroy v. Kansas City (C. C.), 21 Fed. 257, Mr. Justice Brewer, in passing upon a similar constitutional provision, said: "I think, too, in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own. . . . . Such constitutional guaranty needs no legislative support, and is beyond legislative destruction."

We are of the opinion that the judgment ought to be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

The Liability of Cities for changing the grade of streets is the subject of a monographic note to O'Brien v. Philadelphia, 30 Am. St. Rep. 835-850. In Brand v. Multnomah County, 38 Or. 79, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, it is held that a municipality is not answerable in damages for injuries resulting from the establishment of, or change in, street grades, unless specially required to respond by some constitutional, statutory, or charter provision, and that the injury which arises is not a taking of property within the

meaning of the constitutional inhibition that private property shall not be taken for public use without just compensation. But compare with this holding the decisions in Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; Eachus v. Los Angeles, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829; Blair v. Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341; O'Brien v. Philadelphia, 150 Pa. St. 589, 30 Am. St. Rep. 832, 24 Atl. 1047.

DAYTON v. EWART.

[28 Mont. 153, 72 Pac. 420.]

EXECUTION—Exemption of Golddust from as Earnings of the Judgment Debtor.—Golddust mined by a judgment debtor from a mining claim to which he has a possessory title is exempt from execution, under a statute exempting the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of the execution, where the constitution of the state provides that the legislature shall enact liberal homestead and exemption laws. (p. 552.)

C. B. Calkins, for the appellant.

S. G. Murray and L. J. Knapp, for the respondents.

154 CALLAWAY, C. Respondent commenced this action in the district court of Ravalli county, Montana, to recover of appellant the value of certain golddust. Appellant joined issue by answer. The parties then submitted the case to the court upon an agreed statement of facts. From this statement it appears that respondent is, and has been for several years last past, a resident of this state, and the head of a family residing in this state; that he is a miner, having the possessory title to a placer claim, which he has been working with his own water ditch, flume, pipe, tools, and other appliances; that he is a poor man, and that he and his family depend for support upon what he can get from working this placer mine; that on June 30, 1899, in an action in which the firm of May Brothers were plaintiffs and respondent was defendant, the appellant, who was then a constable of Stevens township, in said county, by virtue of a writ of attachment issued in said action, levied upon and took into his custody golddust of the value of sixty-three dollars and twenty cents, the property of respondent, and which had been mined by him within thirty days next preceding the levy of the attachment. On

July 5, 1899, judgment by default was entered for the plaintiffs, execution was issued thereon, and the golddust sold thereunder. Said judgment was obtained upon a promissory note executed by appellant to May Brothers for cash loaned to him.

Prior to the time of obtaining said judgment, and after the golddust had been levied upon, respondent filed with appellant his affidavit, claiming the golddust as exempt from attachment or execution, as earnings of his personal services rendered within thirty days next preceding the levy of the attachment. Upon appellant's refusal to release the same, respondent on July 24, 1899, commenced this suit. Upon the statement of facts submitted, the court entered judgment for respondent, and from such judgment this appeal is prosecuted.

155 The question for decision by this court is whether, under the facts presented, the respondent can successfully claim the golddust mentioned as exempt from attachment and execution.

We must look to section 1222 of the Code of Civil Procedure, for its solution. Subdivision 7 of this section provides that there shall be exempt from execution "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment or attachment to satisfy debts so incurred."

At first glance it might seem that the words "earnings of the judgment debtor for his personal services rendered" contemplate the reward paid to one for services rendered another. A technical construction of the statute would compel the adoption of such a meaning. Such construction would be at variance with the spirit of the constitution and laws of the state. Section 4, article 19, of the constitution, provides that "the legislative assembly shall enact liberal homestead and exemption laws," and this court has held that statutes enacted in pursuance of this mandate should be liberally construed: Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459, 34 Pac. 1020.

The courts of the different states have encountered considerable difficulty in construing exemption statutes, but all agree that such statutes are remedial, and must be construed with

liberality. One difficulty seems to have been in arriving at the true meaning of the words "earnings," "wages," "salary," and the like. The word "earn" means "to gain as a just return or recompense by service, labor, or exertion." "Earnings" is "that which is earned": See the Standard, Century, and Webster's Dictionaries.

In passing upon an exemption statute, the supreme court of 156 Massachusetts said: "We are of opinion that the word 'earnings' was used for the purpose of embracing a larger class of credits than would be included in the more common term 'wages'": Jenks v. Dyer, 102 Mass. 235. This interpretation has been generally adopted: See Bouvier's, Anderson's, and Black's Law Dictionaries.

Mr. Freeman, in his work on Executions, section 234, says: "Between the terms 'wages' and 'salary' there is no material difference when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term 'earnings' is more comprehensive than either of the others. It implies, as do they, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor."

Nor do the words "personal services rendered" necessarily contemplate that the services be rendered another. They may, in proper cases, mean the services which one renders to himself. The word "service" has different meanings. It may mean "an advantage conferred; that which promotes interest or happiness; benefit": See Webster's and Standard Dictionaries. One confers an advantage upon himself by striving for his own benefit, and looks upon his labor done in his own behalf as that which particularly furthers his interest and happiness. The word "render" sometimes means to "bestow or provide; furnish; to give in answer to requirement of duty or demand": Standard Dictionary. One provides for himself and family, and does so in answer to one of the highest requirements of duty.

In reading section 1222, it appears that a miner has exempt from execution "his cabin or dwelling, sluices and pipes, hose, windlass, derricks, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations,

157 not exceeding in value the aggregate sum of one thousand dollars," and so forth. Now, it may be inquired, can it be that the statute exempts all these, and yet does not exempt the reward won by their use, when necessary for the support of the miner's family residing in this state, or exempts to him his tools, and in the same breath deprives him of the fruits of his toil therewith, allowing his family to go in want? Such a construction is clearly unreasonable, and demonstrates to us that, had the legislature intended to restrict the exemption granted, the word "wages" would have been employed, instead of the broader word "earnings."

Again, can it be that the legislative assembly desired to restrict the exemption to those only who are the servants of others? We think not. It has been the policy of our government since its beginning to foster that independence which follows a reliance upon one's own resources. The courts of New York, in construing a similar exemption statute, have arrived at the same conclusion to which we have come: See McSkimin v. Knowlton, 20 N. Y. Civ. Proc. Rep. 274, 14 N. Y. Supp. 283, and cases cited.

Testing the statute under consideration by the rules of construction provided by section 4660 of the Civil Code, we believe we correctly declare the legislative intention.

It must be remembered that in the case at bar it is conceded that the respondent is a poor man, whose family depends for support upon his personal services in working his placer mine; that the sum attached is necessary for the use of his family residing in this state; that the golddust was mined by respondent within thirty days next preceding the levy of attachment; and that the suit brought against him was not upon a debt incurred by him for the common necessaries of life. The court below, therefore, was correct in entering judgment for respondent.

But, while a liberal construction of the exemption laws should always be encouraged, it will be readily perceived that a too liberal construction thereof might lead to many abuses not contemplated by the law-making power, and we deem it proper to say that this case is determined and decided with reference to 158 the facts presented only. "Each case of this character must rest upon its own facts existing at the time in question": Cushing v. Quigley, 11 Mont. 577, 29 Pac. 337.

In our opinion, the judgment should be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

Mr. Justice Milburn Dissented, on the ground that the section of the act in question did not imply an intention on the part of the legislature to protect income from a private and independent business, if such income was not for services rendered others.

That Exemption Statutes are construed liberally in favor of the debtor, see Roberts v. Parker, 117 Iowa, 389, 94 Am. St. Rep. 316, 90 N. W. 744; Krebs v. Nicholson, 118 Iowa, 134, 96 Am. St. Rep. 370, 91 N. W. 923; Kirksey v. Rowe, 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990.

MUTH v. GODDARD.

[28 Mont. 237, 72 Pac. 621.]

POWERS OF ATTORNEY—Construction of.—Where the intention of the parties appears from the language employed in a power of attorney, that intention should prevail, and a strained interpretation should never be given to defeat it. Where third persons are concerned, the words of the power are construed against the donor in case of doubt. (p. 557.)

POWERS OF ATTORNEY—Acting Under, When Regarded as for the Principal's Benefit.—One acting under a power of attorney is not precluded from executing a writing to secure debts due from a partnership of which the donor of the power is a member, on the ground that the act is not for the principal's use and benefit, if the failure to so act must have resulted in the institution of suits and the levies of attachments on the property of the firm. (p. 557.)

POWERS OF ATTORNEY—Construction of.—Every General Power Implies every particular power necessary to its exercise or performance. The authority to accomplish a definite end carries with it the power to adopt the usual legal means to accomplish the object. (p. 562.)

TRUST DEEDS—Power of Attorney, When Authorizes the Execution of.—A power to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, mortgages, hypothecations, and other instruments in writing of whatever kind or nature as may be necessary or proper in the premises, authorizes the execution of a trust deed of the principal's real property to secure the payment of indebtedness, and containing a power of sale. (p. 563.)

TRUST DEEDS with Power of Sale—Probate Proceedings.—Where a trust deed is given, with a power of sale, to secure the payment of indebtedness, and the grantor subsequently dies, the trustee may proceed to exercise the power of sale conferred by it, and it is not necessary for the holder of the indebtedness to enforce his rights through the regular course of administration or by foreclosure in court. (pp. 564, 565.)

Suit by Muth as administrator of the estate of Albert G. Clarke, deceased, to restrain defendants from selling lands

described in a trust deed executed in the name of the decedent by his son Charles A. Clarke, as attorney in fact under a power of attorney executed October 10, 1890, and reading as follows:

"Know all men by these presents, that I, Albert G. Clarke, Sr., of Helena, Lewis and Clarke County, Montana, have made, constituted and appointed and by these presents do make, constitute and appoint Charles A. Clarke, of said city, county and state aforesaid, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive, all such sums of money, debts due, accounts, interest, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachment, arrest, distress or otherwise, and to compromise and agree for the same and acquittances or other sufficient discharges of the same for me and in my name to make, seal and deliver; to grant, contract, agree for, purchase, receive and take, lands, tenements and hereditaments and to accept the seisin and possession of all lands and all debts and other assurances in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, hereditaments upon such terms and conditions and under such covenants as he shall see fit, also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me, and in my name and as my act and deed to sign, seal, execute, and deliver and acknowledge such deeds, leases an assignments of leases and covenants, indentures, agreements, mortgages, hypothecations, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage judgments and other debts and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in or about the premises as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents."

At the execution of the power, Clarke, Sr., contemplated leaving the state, to be absent during the ensuing winter. In November, 1899, he was and long had been a member of the firm of Raleigh & Clarke, which was then indebted in the sum of thirty-five thousand dollars, about two-thirds of which was due to the Union Bank and Trust Company. The cashier of that company notified Raleigh that unless the matter was fixed up, the company would attach Mr. Clarke, who was then in his last illness. His son Charles was sent for, and, as the result of various negotiations, Raleigh transferred all his interest in the firm to Clarke, Sr., and executed to the trust company in the name of the firm seven notes of five thousand dollars each for the moneys due it and for the advances made by it to pay off the other creditors. The son, acting under his power of attorney, indorsed on the notes a guaranty of their payment, and also executed to John H. Tucker as trustee and party of the second part and the trust company as party of the third part a trust deed purporting to convey certain of his father's real property. The trust deed contained a power of sale and a provision for the payment of attorneys' fees of five per cent. Subsequently, in December of the same year, Clarke, Sr., died, and an administration of his estate being granted, the seven notes were presented and allowed as claims against it. Afterward the notes and trust deed were assigned to L. A. Goddard, who commenced to execute the power of sale contained in the deed. Thereupon this suit was brought to prevent the execution of the power, and a temporary restraining order was obtained, and upon the hearing of the order to show cause, an injunction was granted, and from the order granting it the defendants appealed.

Cullen, Day & Cullen, for the appellants.

Walsh & Newman and Toole & Bach, for the respondent.

244 CALLAWAY, C. The following questions have been presented and argued by counsel: 1. Was Charles A. Clarke authorized by the power of attorney to execute the trust deed conveying his principal's individual property to secure the notes of the firm? And herein, did he have the authority to include in the trust deed a power of sale, and a provision for an attorney's fee in case of foreclosure? 2. Can the power of sale be executed now that Albert G. Clarke, Sr., is dead? We will treat these questions seriatim.

1. Authorities in great number have been cited by counsel in discussing the right of Charles A. Clarke to execute the trust deed under the power of attorney above set forth. We have examined them all, and also have made much independent research, in order to arrive at a correct solution of the propositions involved; but no case has been cited to or discovered by us, which, construing a power of attorney like the one in question decides any similar point.

The instrument in question may be denominated an unrestricted general power of attorney. It will be noticed that the donor of the power placed his agent in a position to perform almost every act that may ordinarily arise in the transaction of business. Practically the only limitation it contains is to the effect that the attorney must act for the principal's use and benefit. It must be presumed that in giving this power the principal understood the full meaning of the words he employed, and undertook the risk to which he might be subjected in case his agent should carry the given power to its utmost limit. Being a business man, he must have known that the transactions of business do not always result in profit, and he therefore delegated his agent, his son, very extensive powers, including the authority to pledge his credit and mortgage his property. Being about to leave the state of Montana for the winter, and knowing that he could not personally attend to his business affairs, he [245] confided in his son, and placed him in his stead. And the fiduciary relation then established continued until the donor died.

"Much of the business of the world is transacted by agents, or through agencies, representing their principals. It is a rule recognized by all the authorities that the acts of the agent, within the scope of his employment, are the acts of his principal, and the latter is bound by them. . . . . The rules governing the construction of written instruments generally are resorted to in construing powers of attorney: 18 Am. & Eng. Ency. of Law, 1st ed., 871. The obvious meaning of the terms used is not to be restricted or extended by implication in the absence of necessity. Another well-supported rule relating to powers of attorney is that the intention of the parties, as ascertained by the language used, governs": White v. Furgeson, 29 Ind. App. 144, 64 N. E. 49.

"But it is said the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention

fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties": Hemstreet v. Burdick, 90 Ill. 444. And see Maar v. Given, 23 Me. 55, 39 Am. Dec. 600; Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539; Lamy v. Burr, 36 Mo. 85, 88 Am. Dec. 135; Posner v. Bayless, 59 Md. 56.

"If the writing be open to two constructions, one of which would uphold while the other would overthrow the contract, the former is, where possible, to be chosen": Mechem on Agency, sec. 304. And where third persons are concerned in cases of doubt, the general rule is that the words in the power are to be construed most strongly against the grantor: Story on Agency, sec. 74; Code of Civ. Proc., sec. 3140.

Under a general power of attorney, however, the agent cannot lawfully do any act unless it be for the principal's use and benefit. Thus he cannot lawfully act under it for the private benefit [246] of himself or third persons. Relying on this principle, counsel for plaintiffs contend that under the authority granted Charles A. Clarke he could not lawfully execute the trust deed; not for the reason that the power of attorney is insufficient in form to warrant his execution of it, but because in so doing he was securing a debt of the partnership, and thus was not acting for the use and benefit of his principal. We do not agree with counsel. Albert G. Clarke, Sr., as a member of the firm of Raleigh & Clarke, was liable to third persons for all the obligations of the partnership: Civ. Code, secs. 1941, 3250. Now, where the principal was liable for every dollar of the indebtedness of the partnership, and the partnership was unable to pay its debts, and the other partner had arrived at the end of his resources, what would have been the result if the attorney in fact had neglected to take any action whatsoever? Obviously, the result would have been that the creditors of the firm of Raleigh & Clarke would have instituted suits and levied attachments; merged their claims in judgments running against Albert G. Clarke, Sr., and W. B. Raleigh; issued and levied execution; sold all the firm property, and then a sufficient amount of Clarke's separate property to satisfy their demands. Indeed, the creditors might have levied upon the firm property and the individual property of Albert G. Clarke, Sr., simultaneously. Such action might have entailed great loss upon the solvent partner, Clarke; and it appears that this state of affairs inevitably would have resulted had it not been for the

prompt action of Clarke's attorney in fact, and, under these circumstances, it seems clear that he acted for his principal's use and benefit. Whether any benefit accrued to W. B. Raleigh by reason of the action of Charles A. Clarke as attorney in fact, it is unnecessary to inquire. Doubtless, when Albert G. Clarke, Sr., paid the debts of the firm, it relieved W. B. Raleigh to some extent, but did it change the status of Clarke, Sr., when he was personally liable for the payment of all of these debts, irrespective of any benefit which might or might not incidentally accrue to W. B. Raleigh, his partner?

247 Upon this point plaintiffs say in their brief, "It is not pretended that Charles A. Clarke could, or attempted to, release Mr. Raleigh from the liabilities of the firm." The cases cited by plaintiff which they assert sustain their contention that the attorney in fact of a general partner cannot mortgage his principal's property to secure a partnership liability, even though the principal is solely responsible therefor, are not in point. No case has been cited by them which states the proposition that under a general power of attorney an agent may not mortgage his principal's property in order to save the principal from loss. They mainly rely upon the language found in Mechem on Agency, section 307. We think counsel place a broader construction upon this section than was intended by the learned author. The section, read as an entirety, does not conflict with our views in this case, and an inspection of the cases cited in support of the text discloses this clearly.

There can be no doubt that the attorney in fact, unless especially authorized so to do, cannot bind the principal for the private benefit of the agent himself, or of third persons only. And while we purpose to discuss the applicability of the authorities cited in Mechem on Agency and by counsel to the question here involved, we suggest, in passing, this question: When Albert G. Clarke, Sr., was liable for all the debts of the firm of Raleigh & Clarke, and his individual property was about to be seized by attachment levied by creditors of the firm, did not the agent act in the sole, separate, and individual business of his principal when he took such action as prevented him from being thus greatly injured? And just here it must be remembered that Albert G. Clarke, Sr., was at this time the owner of all the property of Raleigh & Clarke. Raleigh, while still liable to the firm creditors, had transferred all his property to Clarke.

The first case cited by Mr. Mechem in support of section 307, supra, and discussed by counsel, is Stainback v. Read, 11 Gratt. 281, 62 Am. Dec. 648, in which it appears that the controversy arose over a bill of exchange which was not [248] drawn in the business of the principal, but in that of the attorney in fact exclusively. Attwood v. Munnings, 7 Barn. & C. 278, 4 Eng. Rul. Cas. 364, is a leading and much misquoted case. The defendant had given to his wife a power of attorney authorizing her to accept for him "such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require." She accepted a bill of exchange which was not drawn by the principal's agent for that purpose; in other words, the drawer of the bill of exchange had no authority to draw it, nor was it within his ostensible authority. The court held that the wife, as attorney in fact, exceeded her power in accepting the bill, as the agent who drew it exceeded his in drawing it. North River Bank v. Aymar, 3 Hill, 262, was a case in which the attorney in fact executed notes for the accommodation of third persons, the notes having no connection with the principal's business. The notes were, however, drawn within the ostensible authority of the attorney in fact; and, while they were held to be fraudulent as between the principal and the attorney in fact, nevertheless they were held to bind the principal when in the hands of a bona fide holder. In the case of Camden Safe Deposit etc. Co. v. Abbott, 44 N. J. L. 257, the note in suit "was put forth for the personal benefit of the attorney, who converted its proceeds to his own use." In Wallace v. Branch Bank at Mobile, 1 Ala. 565, the attorney in fact was given authority "for the plaintiff and in his name to draw or indorse promissory notes," etc., and the court said: "It is very clear that there is no express delegation of authority to the attorney to draw or indorse notes for the mere accommodation of third persons; such notes, though they might be drawn or indorsed in his name, certainly would not be for the principal himself. Gallagher's right to make and negotiate paper was not unlimited, but was to be restricted to a transaction in which the plaintiff at least had the semblance of interest." In Adams Exp. Co. v. Trego, 35 Md. 47, it was held that a general superintendent of the express company, with authority to employ and discharge agents [249] and direct their conduct, make contracts, and exercise a general supervision over the business of the company, had no power to license one of his employés, an assistant superintend-

ent, to engage in and carry on a business in competition with and injurious to the express company. The court said: "The powers of an agent are to be exercised for the benefit of the principal only, and not of the agent or of third parties."

Plaintiffs also quote at length from Mechanics' Bank v. Schaumburg, 38 Mo. 228. In that case it appeared that Orleana C. Schaumburg and Martha A. Wills each gave to John W. Wills a power of attorney authorizing him "in her business, for her use, and in her name" to perform certain acts; among others, "to borrow money and execute notes." Wills was president of the Mechanics' Bank, to which institution he was indebted in the sum of forty-five thousand dollars. As attorney in fact he executed notes in the joint names of his two principals for eighty-five thousand dollars to the cashier of the bank, who drew checks for the amounts in favor of Wills, and the latter immediately deposited the same to his own credit in the bank. All of this money was used by Wills for his private benefit. The bank knew that the loan was actually made to John W. Wills in his name, for his use, and in his business. The court correctly held that Wills' principals were not bound by such acts on the part of their agent. The court held in Ferreira v. Depew, 17 How. Pr. 418, that the words employed in the power of attorney did not confer upon the attorney the right to transfer all the principal's property to a trustee for the payment of his (the principal's) debts. In Johnston v. Wright, 6 Cal. 373, the principal authorized the attorney in fact "to settle and adjust all partnership debts, accounts, and demands, and all other accounts and demands now subsisting, or which may hereafter subsist, between me and any person or persons whomsoever," and, among other purposes, the power was given to execute releases. The attorney discharged a debt due the principal and two others jointly. In reaching its conclusion the court said: "In Attwood v. Munnings, 7 Barn. & C. 279, the power was to indorse bills 'for [250] the principal, in his name, and to his use,' and also to 'accept bills drawn by his agents or correspondents.' In the suit upon a bill drawn by one of the partners of the principal for the benefit of the partnership, and accepted by the agent, it was held that the power extended only to the individual business of the principal, and not to his partnership affairs." It is apparent that the court did not understand the ruling in Attwood v. Munnings, as no such decision was reached in that case. The California court then went on to say that, as the debt released

was neither an individual nor a partnership debt, but a joint debt, the language of the power of attorney was not broad enough to authorize the attorney's act, and said that, if the principal had personally executed the release, and had used only the language contained in the power of attorney, it would have been totally ineffectual to release the covenant on which the controversy rested.

Whether the agents in the last two cases cited acted or assumed to act for the use and benefit of their respective principals, we are unable to ascertain. All of the other authorities cited by plaintiffs will be found, upon examination, to treat of cases wherein the agent acted either for the private benefit of himself or third persons, or else clearly transcended the authority granted him.

In the power of attorney before us Charles A. Clarke is given authority "to sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions and under such covenants as he shall see fit." And also "to sign, seal, execute, and deliver and acknowledge" such mortgages, hypothecations, bills, bonds, notes, receipts, evidences of debt, and "such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises." Under the language used can it be successfully contended by anyone that Charles A. Clarke had not the right to execute and deliver notes, mortgages, and hypothecations? If he could execute such, for what purpose would the instruments be executed? Certainly to secure debts on the part of the principal. [251] When the principal executed the power of attorney he must have contemplated that at some time it would be necessary for his attorney in fact to execute instruments in writing in recognition of debts owed by him, the principal; otherwise, for what purpose were such words as we have last quoted inserted in the power of attorney? Lamy v. Burr, 36 Mo. 85, 88 Am. Dec. 135. If we were to say that the attorney in fact had no right to execute notes, mortgages, and hypothecations, we might as well say that the principal never executed any power of attorney at all. We have heretofore shown that the debt secured by the trust deed in question was the principal's debt, and, after W. B. Raleigh had executed the instruments conveying all of his property to Albert G. Clarke, Sr., the debt secured was practically the sole and individual debt of Clarke, as between himself and Raleigh. The attorney in fact could not take a new partner into the firm of Raleigh & Clarke, and

neither could he dissolve the partnership under his power; but when Raleigh, the other partner, voluntarily turned over all of his property to Clarke, Clarke's attorney in fact, under the power given him, had the right to receive and protect it.

Plaintiffs contend that Charles A. Clarke, as attorney in fact, had no right to execute the guaranty which he indorsed upon the notes. As we view it, this guaranty was useless and nugatory. Albert G. Clarke, Sr., was already liable for the payment of the notes, and the guaranty executed on his behalf imposed upon him no additional obligations whatever, as it was in terms a guaranty of his own debt: In re Wm. H. Blumer & Co. (D. C.), 13 Fed. 622. The question, then, is, As Charles A. Clarke had the right as attorney in fact to secure the payment of the notes in question, did he have the right to execute the trust deed in controversy, including the power of sale? Every general power implies every particular power necessary to its exercise or performance; in other words, "the authority to accomplish a definite end carries with it the power to adopt the usual legal means to accomplish the object: Chitty on Contracts, ed. 1860, 236; Anderson v. Coonley, 21 Wend. 279"; Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

252 In the case of First Nat. Bank v. Bell etc. Co., 8 Mont. 32, 19 Pac. 403, the court, speaking through Mr. Chief Justice McConnell, said: "While the exact boundary between mortgages with powers of sale, and deeds of trust, is not very clearly defined, we think the deed in question should be classed with the former. . . . . But, from the view we take of it, we do not think it important to determine to which class it technically belongs. . . . . 'A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey or to sell, or to do any other thing upon the payment of a certain sum of money. Courts of equity look upon it as a mortgage, and deal with it as such': Perry on Trusts, sec. 602d." In reviewing and affirming this case the United States supreme court said: "The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can pro-

ceed under the power added for the sale of the property to obtain payment of the indebtedness": Bell etc. Co. v. First Nat. Bank, 156 U. S. 470, 15 Sup. Ct. Rep. 440. Section 3821 of the Civil Code provides: "A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." Section 1293 of the Code of Civil Procedure provides: "When a mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this chapter to foreclose, or proceedings may be had under the provisions of the mortgage." We therefore conclude that Charles A. Clarke, as attorney in fact, had the right to execute a mortgage [253] in the form of a trust deed, containing a power of sale, just as he would have had the right to execute a mortgage in the ordinary form. Creating a trustee with power of substitution to his successors in trust was not delegating a delegated power. In effect, it merely provided a means for obviating the appointment of a receiver and foreclosure by an action in court in case of a default by the principal. Furthermore, Charles A. Clarke under the trust deed conveyed away the whole legal title. His power over the property then ceased. His act was not a delegation of power, but an execution of the power conferred under the power of attorney: Lamy v. Burr, 36 Mo. 85, 88 Am. Dec. 135.

It is also contended by plaintiffs that, even had Charles A. Clarke, as such attorney, the right to execute the trust deed in question, he had no right to include therein a provision for an attorney's fee. It is unnecessary for us to decide this question. The mortgage foreclosure was commenced under the power of sale therein contained, whereas it is distinctly specified in the trust deed that the attorney's fee shall be collected only if the mortgage be foreclosed by an action. Plaintiffs are therefore complaining of something which is not in controversy in this action.

2. Can a power of sale be executed after the death of the mortgagor? The decisions are not in harmony as to whether such a power can be so executed, for the reason that some affirm and some deny the power to be one coupled with an interest. If the power is one coupled with an interest, it can be executed after the death of the grantor; otherwise not. Chief Justice Marshall, in Hunt v. Rousmanier, 8 Wheat. 174, in

speaking of such a power, uses the following language: "We hold to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected [254] with an interest." In Bergen v. Bennett, 1 Caines Cas. 1, 2 Am. Dec. 281—a leading case on this subject—the court said: "It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion, the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to disposing of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land." It was said by our own court, in First Nat. Bank v. Bell etc. Co., 8 Mont. 32, 19 Pac. 403: "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable." Says Mr. Jones, in his work on Mortgages, section 1792: "This being [a power] coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the name of the grantee continues": And see cases cited; Whitmore v. San Francisco Sav. Union, 50 Cal. 146; More v. Calkins, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583.

From the foregoing authorities it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest; but, irrespective of this, the legal title to the property having passed to the trustee and from the mortgagor, the death of the latter could in no wise affect the trustee's right to carry out the trust which the mortgagor had reposed in him.

It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of

355 administration or by foreclosure in court. This argument cannot be maintained. "The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution": Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234. The Texas cases cited by plaintiffs are not in point: See In re Horsfall's Estate, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected: Code Civ. Proc., sec. 2603.

In our opinion, the order should be reversed.

Per CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and the cause remanded.

A Power of Attorney, like other instruments, is construed according to the natural import of its language. It is given a strict interpretation, and the authority is not extended by construction or intendment beyond what is given in terms, or is necessary to carry the authority into effect: See Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019; monographic notes to Security Sav. Bank v. Smith, 84 Am. St. Rep. 767; Davenport v. Parsons, 81 Am. Dec. 777.

Sales Under Powers in Mortgages and trust deeds are discussed in the monographic notes to Houston v. National etc. Loan Assn., 92 Am. St. Rep. 573-598; Tyler v. Herring, 19 Am. St. Rep. 266-297. It has been held that a power of sale in a mortgage is a power coupled with an interest, and is not suspended or terminated by the death of the mortgagor: Grandin v. Emmons, 10 N. Dak. 223, 86 N. W. 723, 88 Am. St. Rep. 684, and cases cited in the cross-reference note thereto.

STANFORD v. CORAM.

[28 Mont. 288, 72 Pac. 655.]

CONSTITUTIONAL LAW—Statutes, Vested Rights in.—A citizen can have no vested right in any general law which can prevent its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. (p. 568.)

JUDGMENTS—Interest, Statutes Reducing—Retroactive Effect of.—An amendment to a section of the Civil Code prescribing the rate of interest payable on judgments applies to judgments previously recovered, and though so construed, is not unconstitutional. (p. 569.)

M. S. Gunn, for the appellant.

M. M. Lyter and A. C. Gormley, for the respondents.

290 POORMAN, C. In this action judgment was entered for the plaintiff and against the defendants on the third day of December, 1898. On the twenty-fourth day of March, 1902, the defendant Coram paid to the plaintiff on account of said judgment the full amount of the principal sum thereof, with interest thereon at the rate of ten per cent per annum until the twenty-eighth day of February, 1899, and at the rate of eight per cent per annum from that date until the date of payment. The plaintiff acknowledged partial satisfaction of the judgment, and the appellant proceeded by motion as provided by section 1201 of the Code of Civil Procedure, for an 291 order requiring the plaintiff to satisfy the judgment in full. It was stipulated that, if the plaintiff was only entitled to collect interest on said judgment at the rate of eight per cent per annum from the twenty-eighth day of February, 1899, said judgment was paid in full; otherwise there was a balance due. This motion was overruled. The appeal is from the order of the court overruling the motion.

The error assigned in this case is that the court erred in deciding that the judgment had not been paid in full and in overruling defendant's motion. It appears from the statement and the stipulation that the full amount of the judgment, with interest thereon at the rate of ten per cent until the 28th of February, 1899, and at the rate of eight per cent per anum thereafter has been paid. The question presented is whether the act of the legislature approved February 28, 1899, reducing the rate of interest from ten per cent per annum to eight per cent

per annum, relates to and affects the interest due on this judgment. Section 2588 of the Civil Code, in force at the time this judgment was rendered, provided that "interest is payable on judgments recovered in the courts of this state at the rate of ten per cent per annum, and no greater rate, but such interest must not be compounded in any manner or form." This section of the statute was amended by an act approved February 28, 1899 (Laws 1899, p. 125), so as to read as follows: "Interest is payable on judgments recovered in the courts of this state at the rate of eight per cent per annum, and no greater rate, but such interest must not be compounded in any manner or form." This amendatory act further provides: "Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed. Sec. 3. This act shall take effect and be in full force from and after its approval."

A judgment in a civil case is a judicial determination of rights existing between parties, or by one party and against the other. It does not create any new rights. It only defines and determines what rights already exist. The right to have a judgment enforced is not inherent in the judgment itself. This 292 right and authority come from other provisions of law. The judgment is itself a creation of law. It bears no interest unless granted by legislative enactment. It is in the nature of a contract, but is not a contract within the meaning of section 10, article 1 of the constitution of the United States, and section 11, article 3 of the constitution of the state of Montana. It lacks the element of consent necessary to a contract. It is in invitum as to the losing party. The contract between the parties is voluntarily surrendered and canceled by merger in the judgment, and ceases to exist. It is no longer looked to for any purpose except as evidence supporting the judgment. There is no longer any contract for the payment of either principal or interest. A party is not entitled to interest merely because he has a judgment, but solely because the legislature, in its discretion, has said he may charge interest. It is an arbitrary right. Parties appealing to the law can take only what the law awards them. It may be true that parties entering into contracts or appealing to the courts have in mind the fact that any judgment obtained will draw interest at the rate then fixed by the legislature. It is likewise true that they have notice of the inherent power of the legislature to change this rate, or to annul it altogether, and such enactments are not retroactive or retrospective so long as they do not interfere with

the collection of interest already accrued. Laws changing the rate of interest apply to accounts with respect to which no agreement exists as to interest. Then why do they not apply to judgments when a judgment is not a contract, and the interest thereon is not the result of agreement between the parties? The rate of interest is fixed by the legislature without reference to the contract on which the action is founded, and without regard to the will or assent of the parties to the action. The judgment creditor is entitled to the interest prescribed by law during the judgment debtor's default in payment. "Where the transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no cause arises for the operation of the constitutional prohibition." This law now 293 under consideration is a general law. A citizen can have no vested right in a general law which can preclude its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law: Cooley's Constitutional Limitations, 6th ed., 343.

In the case of Morley v. Lake Shore Ry. Co., 146 U. S. 169, 13 Sup. Ct. Rep. 57, the supreme court of the United States, following the decision in O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64, in considering the same question here under discussion, uses this language: "It is contended . . . . that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment if such interest be prescribed by statute; but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay. 'A judgment is in no sense a contract or agreement between the parties.'" The court then holds that a legislative enactment reducing interest on all judgments applied to a judgment then existing.

The supreme court of Wyoming, in the case of Wyoming Nat. Bank v. Brown, 7 Wyo. 502, 75 Am. St. Rep. 939, 53 Pac. 292, 61 Pac. 465, says: "An act reducing the rate of interest which judgments shall bear, passed after the rendition of the judgment, is a conclusive determination by the legisla-

ture that the damages accruing to the judgment creditor by being deprived of the use of the amount due are measured by a lower rate of interest during the period subsequent to the taking effect of the act than from the rendition of the judgment up to that time. If this view is correct, the plaintiff in this case has received all damages which [294] accrued while its judgment remained unpaid, and none of its rights have been destroyed or interfered with by legislation. The defendants' obligation to pay interest being simply that which the law imposed, they discharged that obligation by paying what the law exacted."

In the case of Palmer v. Laberee, 23 Wash. 409, 63 Pac. 220, the supreme court holds that a law reducing the rate of interest on judgments applies to judgments rendered prior to the passage of the act and then existing.

Where the contract between the parties provides that interest shall be computed at a certain rate until payment is made, a question might arise not presented by the record in this case, and on which no opinion is here expressed.

We have examined the cases cited by respondent as modifying the decision in the Morley case, and find that the same are not inconsistent with the doctrine announced in that case.

The principles involved in this case are so thoroughly discussed in the cases cited that further comment here is unnecessary. We are of the opinion that the act of the legislature of February 28, 1899, reducing interest on all judgments, applies from the date of its approval to this judgment, and that the court erred in overruling defendant's motion; and that, inasmuch as the stipulation and record show that the full amount due on this judgment has been paid, this cause should be remanded to the district court, with directions to set aside the order made overruling defendant's motion, and to enter an order sustaining said motion.

Per CURIAM. For the reasons given in the foregoing opinion, it is ordered that this cause be remanded to the district court, with directions to that court to set aside the order heretofore made overruling the defendant's motion for an order requiring the plaintiff to satisfy the judgment in full, and to enter an order sustaining said motion.

A Person has no Vested Interest, it has been held, in any rule of the common law: State v. Heldenbrand, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25. But see Wilson v. Simon, 91 Md. 1, 80 Am. St.

Rep. 427, 45 Atl. 1022. A purely statutory right may be taken away entirely: Relyea v. Tomahawk Paper etc. Co., 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412.

The Effect on Judgments of a change in the statute reducing the rate of interest is considered in Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64, and note.

GEMMELL v. SWAIN.

[28 Mont. 331, 72 Pac. 662.]

MINING CLAIMS.—The location of a mining claim can rest only upon actual discovery of a vein or lode, and notice of location posted before such discovery is a nullity. (p. 571.)

MINING CLAIMS—Possession of, When Restricted to Actual Occupancy.—One who enters upon vacant, uninclosed mineral land of the United States, prospecting for veins of mineral-bearing rock, acquires no possession or right of possession except of the ground and shafts where he prosecutes his work, and his possession cannot be enlarged so as to include an entire twenty-acre tract, or the whole amount of ground which may be claimed under one or more quartz locations. Until he makes a discovery, he has no right of possession of any definite portion of mineral lands. (p. 571.)

MINING CLAIMS—Injunctions as Between Prospectors.—Competing prospectors cannot make use of writs of injunction to secure priority of discovery or location, and one who enters upon a portion of a twenty-acre tract and sinks shafts and prospects for mineral-bearing rock is not entitled to an injunction to prevent another from entering upon another part of such tract and prospecting on the parts thereof not in the actual possession of the plaintiff. (p. 572.)

Suit to prevent the defendant from entering upon, sinking shafts, running tunnels, and attempting to discover veins of mineral-bearing rock on certain lands. The complaint stated that the plaintiff entered on a twenty-acre tract of the public mineral lands of the United States on December 19, 1899, for the purpose of prospecting for and discovering and locating veins of mineral-bearing rock; that he proceeded to sink three shafts, but before making any discovery, he was enjoined from further search; that he afterward posted notices of location, and the plaintiffs in the action in which the injunction issued then went upon the land and commenced work for the purpose of discovering veins and precious metals. The plaintiff in this action therefore prayed for an injunction against the defendants therein further proceeding with their work. A demurrer

to the complaint was sustained and a judgment thereupon entered in favor of the defendants, but the plaintiff appealed.

George M. Bourquin and M. S. Gunn, for the appellant.

Forbis & Evans and T. Bailey Lee, for the respondent.

335 HOLLOWAY, J. The only question for determination is whether the complaint states facts sufficient to entitle the plaintiff to an injunction. The complaint, upon its face, shows that the land in dispute was vacant, uninclosed, and unimproved mineral land of the United States; that the plaintiff went upon it, and was prospecting for veins of mineral bearing rock, when he was enjoined. He had made no discovery, and consequently no location had been made, and none could be, for a location can rest only upon an actual discovery of such vein or lode: Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714; U. S. Rev. Stats., sec. 2320; U. S. Comp. Stats. 1901, p. 1424. He was simply a prospector upon the public domain, with the bare, naked possession of the ground immediately about the three shafts where he was prosecuting his work. His possession was only such as is characterized in the law as possessio pedis, and could not be enlarged to include the entire twenty-acre tract, or the whole amount of ground which he might have claimed under one or more quartz locations. Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed no right of action accrues, and even then no injunction would issue to restrain a mere trespass—certainly not in the absence of some showing of irreparable injury or the insolvency of the trespasser.

No contention is made that the work done by the defendants in prospecting this ground was done in or about any one of the shafts where plaintiff was prosecuting his work when enjoined, or that the work done by the defendants in any manner interfered with the work done by the plaintiff. The fact that plaintiff 336 posted a notice at each of his shafts did not create any new right in him, or enlarge the right he already had. A notice of location (for such these notices purported to be) posted upon mineral land before discovery is made is an absolute nullity: Upton v. Larkin, 5 Mont. 600, 6 Pac. 66; U. S. Rev. Stats., sec. 2320; U. S. Comp. Stats. 1901, p. 1424. The mere

fact that the plaintiff was enjoined from continuing his work, and that, too, wrongfully, as determined by this court (Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407), did not alter the relative rights of the parties, or entitle the appellant here to an injunction in this action. Competing prospectors cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to, a mining claim.

We are of the opinion that the complaint does not state facts sufficient to entitle the appellant to an injunction, and that the district court committed no error in sustaining the demurrer. The judgment is affirmed.

The Validity of the Location of a Mining Claim depends primarily upon the discovery of a vein or lode within its limits: Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948. A location of oil lands is invalid if the locator had at the time made no discovery of mineral: Miller v. Chrisman, 140 Cal. 440, ante, p. 63, 73 Pac. 1083, 74 Pac. 444. As to the possessory rights of miners, see the monographic note to McClintock v. Bryden, 63 Am. Dec. 105, 106.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. LEWIS AND CLARKE COUNTY.

[28 Mont. 484, 72 Pac. 982.]

CORPORATIONS, FOREIGN—When Subject to State Taxation.—A statute declaring that every insurance corporation transacting business within the state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred applies to foreign life insurance corporations. (p. 574.)

TAXES AND LICENSE FEES—When Both will be Exacted. Under a statute providing that the necessary revenue for the support of the state shall be provided by the legislature, which shall levy a uniform rate of assessment and taxation, and that the legislature may also impose license taxes both upon persons and corporations doing business within the state, both property and license taxes may be levied, and the exaction of the one tax is no bar to the imposition of the other. (p. 575.)

LICENSE TAXES may be Exacted for the Purpose of Revenue or of Regulation, or for Both Purposes in the discretion of the legislature, under a constitution authorizing it to impose property and license taxes. (p. 575.)

TAXATION—When Uniform on the Same Class of Subjects.—A statute which applies to each and every insurance corporation or company transacting business within the state, and provides the manner in which such corporations shall be taxed upon the excess of

their premiums received over losses and expenses incurred, is uniform on the same class of subjects, within the meaning of the constitution. (p. 576.)

CORPORATIONS, FOREIGN.—The Legislature has the Right to Prescribe Reasonable Terms upon which foreign corporations may do business within the state. (p. 576.)

TAXATION OF FRANCHISES—Right of Foreign Corporations to do Business Within the State.—When a foreign corporation has, by complying with the terms of a statute, acquired the right to do business within the state, it obtains a privilege or right not possessed by citizens generally and not conferred upon it by its original franchise, and which may be subjected to taxation by the state. (pp. 576, 577.)

CORPORATIONS, FOREIGN — Interstate Commerce—Taxation, When Does not Interfere with.—A statute applicable to foreign insurance corporations and authorizing taxation upon the excess of premiums received over losses and ordinary expenses incurred within the year in a county in which an agent transacts the business, does not interfere with interstate commerce. (p. 577.)

STATUTES—Repeal of by Implication.—A general license law relating to insurance corporations, both domestic and foreign, requiring fees to be paid prior to the transaction of any business, which fee is a fixed sum varying in amount only at the will of the corporation as to the amount of premium it asks permission to collect, does not by implication repeal a pre-existing statute authorizing taxes to be imposed on any insurance corporation transacting business within the state upon the excess of premiums received over losses and ordinary expenses incurred. (p. 578.)

CONSTITUTIONAL LAW—Taxation, Want of Uniformity in. Under a constitution providing that the power to tax corporations or corporate property shall never be relinquished, a statute imposing a tax on insurance corporations based on the excess of their premiums received over losses and ordinary expenses incurred within the state and exempting them from all other taxes, is unconstitutional so far as the exemption is involved. (p. 580.)

CONSTITUTIONAL LAW—Statute Void in Part, When may Stand as to the Residue.—A statute purporting to impose a tax on insurance corporations based on the excess of premiums received over losses and expenses incurred and exempting the corporation from all other taxation, though void as to the exemption, is valid and enforceable in other respects. (p. 581.)

CONSTITUTIONAL LAW.—Reasonable Doubts of the Constitutionality of a Statute are Resolved in favor of its validity. (p. 584.)

James Donovan, attorney general, for the appellant.

Toole & Bach and M. S. Gunn, for the respondent.

488 POORMAN, C. This action was commenced in the district court on the twenty-first day of May, 1902, by the filing of an agreed case, and was instituted for the purpose of determining the validity of a tax claimed to be due from the plaintiff to the defendant "upon the excess of premiums received

over losses and ordinary expenses incurred within the state" during the previous year. The name of the plaintiff expresses the character of business transacted. Judgment was rendered for plaintiff, and from this judgment defendant appeals.

The agreed case complies with the provisions of section 2050 et seq. of the Code of Civil Procedure, and the record shows that all steps have been taken and all proceedings had necessary to present for determination the questions involved in the error assigned. The points of controversy upon which the decision of the supreme court is asked are as follows: 1. Does section 489 681 of the Civil Code of the state of Montana apply to foreign mutual life insurance companies? 2. Is any authority given by said section 681 to assess taxes against a foreign mutual life insurance company? 3. Has said section 681 been repealed, or is it still in force? 4. Is said section 681 constitutional?

Section 681 of the Civil Code reads as follows: "Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuse to render the list or to make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

1. Does this provision apply to foreign life insurance companies? This section is a part of chapter 1, title 4, part 4, division 1, of the Civil Code, and is entitled "Stock and Mutual Insurance Corporations." The agreed case contains the statement that the respondent was doing the business of a foreign mutual life insurance company. Sections 650 to 668, both inclusive, of this chapter, provide for the formation and regulation of domestic mutual insurance companies. Sections 669 to 680, inclusive, apply to foreign insurance companies and societies. Section 681, as will be seen, applies to "each and every insurance corporation or company transacting business in this state." The conclusion must be that it was the in-

tention of the legislature to extend the provisions of this latter section to insurance companies doing business of the character specified in the agreed case.

[490] 2 and 3. Section 1 of article 12 of the state constitution reads: "The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." Two schemes or systems of taxation are recognized by this section—a property tax and a license tax. Authority is also given by this section for the coexistence of both of these systems of taxation with reference to the same person or corporation. The two systems are not mutually dependent. Each is independent of the other, and the existence of one is not a bar to the imposition of the other. Nor is it necessary that the license system should be employed only as a police supervision or regulation. The constitution confers upon the legislature the authority to employ both systems of taxation in the exercise of its duty to provide "the necessary revenue for the support and maintenance of the state." No limitation is placed upon the purposes for which the license system may be employed, and it may be resorted to for the purposes of revenue, or for the purposes of regulation, or for both of such purposes, in the discretion and wisdom of the legislative will: State v. Camp Sing, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516; State v. French, 17 Mont. 54, 41 Pac. 1078. The justice of the license system of taxation for any other purposes than those of police supervision and regulation has many times been called in question, but this is a matter for legislative determination.

Section 7 of this article of the constitution provides that "all corporations in this state, or doing business therein, shall be subject to taxation . . . . on real and personal property owned or used by them." Section 11 of the same article provides that taxes shall be "uniform upon the same class of [491] subjects." Section 17 of the same article reads: "The word 'property' as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation

of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed." This latter section, in its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable of private ownership.

The provisions of the section of the statute under consideration apply indiscriminately to "each and every insurance corporation or company transacting business in this state." This includes domestic, as well as foreign, insurance companies. The law is therefore "uniform upon the same class of subjects." The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in this state: Paul v. Virginia, 8 Wall. 168; Southern etc. Assn. v. Norman, 98 Ky. 294, 56 Am. St. Rep. 367, 32 S. W. 952; Scottish etc. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665. The character, kind and amount of business done by the company, as well as the situs of its tangible property, may be considered in applying the various systems of taxation.

The franchise of a corporation is granted by the jurisdiction where the company is incorporated, and its situs is in the state or country of its origin; but before the company can do business in this state it must comply with the terms of the statute relating thereto, and upon such compliance a certificate of authority is issued to it. It then stands, under this law, on the same footing with domestic companies, and is subject to the same taxation on the same class of property. This certificate of authority issued to a foreign insurance company confers upon such company a privilege or right not possessed or enjoyed [492] by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise, and by it the company is authorized to establish, conduct, and maintain an insurance business, the value of which is ascertained in the manner prescribed by statute; that is, "the excess of premiums over losses and ordinary expenses incurred." It applies only to business transacted within the state, and is not objectionable as interfering with interstate commerce. "'Business done within this state' cannot be made to mean business done between that state and other states": Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250. The situs of the business done is therefore within the state. Though the company may transact a large

business, yet the expenses and losses may equal or exceed the amount received. In that event the company pays no taxes. The method adopted by the statute of ascertaining the value of the privilege or right granted to the company is eminently a fair one, for the reason that it seeks to make only the net proceeds or profits the measure of value; and the taxes imposed by this statute are not a fixed or arbitrary amount, but are determined at the same rate that all other personal property is taxed.

Judge Cooley, in considering the subject of taxing business and privileges, says: "And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes": Cooley on Taxation, 2d ed., 570. Further on he says: "Taxes which are most customary are: 1. On the privilege of carrying on the business; 2. On the amount of business done; 3. On the gross profits of the business; 4. On the net profits or profits divided. . . . . It has been seen that it is no conclusive objection to any such tax that it duplicates the burden to the person who pays it. To tax a merchant upon his stock as property, and also upon his gross sales may seem burdensome, but it is not unconstitutional when the people have not seen fit expressly to forbid it. The [493] two taxes are not identical, and, though it may operate unjustly in individual cases to impose both, such will not be a necessary result": Cooley on Taxation, 2d ed., 571. Again we find this language: "But license and tax do not necessarily go together; a license may be required when no tax is imposed, and an unconditional license does not exempt the licensee from being taxed upon the privilege it gives him. In this particular all valuable privileges stand upon the same footing; they are all liable to taxation at the will of the state, unless the state has bargained to exempt them. As is said in one case: 'There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in.' . . . . The privilege obtained by the license may therefore be taxed in consideration of the property value it possesses": Cooley on Taxation, 2d ed., 573.

The nature of the business transacted by an insurance company does not require it to have any tangible property within the state on the first Monday in March of each year, when property becomes liable for taxation. Yet its business is here; it owns or possesses the privilege of doing that business within

this state; and under the provisions of section 681, supra, the business transacted must result in a profit to the company before taxes can be levied. If the privilege granted, which has the force and effect of a franchise, and is therefore property under the constitution, proves to be valuable, it is proper subject for taxation within the meaning of article 12 of the state constitution. Whether this is regarded as a tax upon the value of the franchise right of the company to do business in this state, measured by the net income, or as a tax on the business established and done, regarded as property separate from the money received as premiums, the value of which is measured by the same standard, is immaterial. The tax remains the same.

The act of March 4, 1897 (Sess. Laws 1897, p. 76), is a general license law, relating to insurance companies, both domestic [494] and foreign, and applies to all classes and kinds of insurance. The fee therein required must be paid prior to the transaction of any business. It is a fixed sum, varying in amount only at the will of the company as to the amount of premiums it asks permission to collect, is not diminished by reason of losses paid or expenses incurred, and a violation of the act is punishable by fine and imprisonment. This act does not in express terms repeal section 681, or that part of said section under which this tax is levied, and it is so dissimilar in its requirements that no repeal by implication can be inferred. These considerations lead to the conclusion that the legislature of the state has an undoubted right to provide for the assessment and taxation of insurance companies as provided in section 681 of the Civil Code, and that that part of said section relating to such assessment is not repealed by any subsequent enactment.

As supporting or discussing the general views herein expressed, we cite the following authorities: Cooley on Taxation, 2d ed., 570 et seq.; Southern etc. Loan Assn. v. Norman, 98 Ky. 294, 56 Am. St. Rep. 367, 32 S. W. 952; Scottish etc. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; Porter v. Rock Island etc. R. R. Co., 76 Ill. 561; People v. Equitable Trust Co., 96 N. Y. 387; People v. Home Ins. Co., 92 N. Y. 328; Western Union Tel. Co. v. State Board of Assessment, 80 Ala. 273, 60 Am. Rep. 99; United States Exp. Co. v. Ellyson, 28 Iowa, 370; Insurance Co. of North America v. Commonwealth, 87 Pa. St. 173, 30 Am. Rep. 352; Kittan-

ning Coal Co. v. Commonwealth, 79 Pa. St. 100; Connecticut Mut. Life Ins. Co. v. Commonwealth, 133 Mass. 161.

4. It is next contended that section 681 is in conflict with the state constitution, and is therefore void. In investigating the history of the law for the discovery, if possible, by both intrinsic and extrinsic evidence, the intent of the legislature in enacting this section, we find that the section is practically the same as the first half of section 37 of the act of 1883 (Sess. [495] Laws 1883, p. 83), and is incorporated in the Compiled Statutes of 1887 as section 600, fifth division. The act of 1883 was amended in 1885 (Sess. Laws 1885, p. 87), and was repealed in 1887 by Council Bill No. 33, approved March 10, 1887; the section enacted in lieu of section 37 being section 1676, fifth division, Compiled Statutes of 1887. At the extraordinary session of 1887 all of "C. B. No. 33" was repealed by House Bill No. 2, approved September 14, 1887: Extr. Sess. Laws 1887, p. 82. "C. B. No. 33," although entirely repealed by the act of September 14, 1887, is included in the Compiled Statutes of 1887 as sections 1665 to 1789, both inclusive. Section 681, supra, was not an existing law at the time of the adoption of the code, within the meaning of section 4653 of the Civil Code, and was not law until made so by the adoption of the codes in 1895. It must therefore be construed as an original act of the legislature of that year.

Section 7 of article 12 of the constitution provides, among other things, that "the power to tax corporations or corporate property shall never be reliquished or suspended." The evident meaning of this constitutional provision is that the property of corporations shall bear its equal share of the burdens of taxation, and that the provisions of section 1 of this article of the constitution. that the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property," applies to artificial as well as to natural persons. Said section 681, after providing for the taxation of insurance companies on the excess of premiums over losses and expenses, contains another sentence which reads: "Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law." Under this latter provision an insurance company may be the owner of a vast amount of personal property situated within this state. on which it cannot be taxed, because the same cannot be classified under the head of "excess premiums," whether the term "excess premiums" means surplus money or

the value of the company's franchise or business regarded as [496] property. This part of the section is so directly in contravention of the provisions of the constitution above quoted that further comment is unnecessary. Such statutes have been held void under similar constitutional provisions in the following cases: State v. Poynter, 59 Neb. 417, 81 N. W. 431; Hawkeye Ins. Co. v. French, 109 Iowa, 585, 80 N. W. 660; People v. McCreery, 34 Cal. 432; People v. Whyler, 41 Cal. 351.

The remaining part of this section is not invalid, as conflicting with the organic law, unless made so by the unconstitutionality of the clause above considered. The effect of the conclusion reached with reference to the exemption clause of this section upon the section as a whole, and the chapter of which it is a part, remains to be considered. "When the valid and invalid portions of the legislative enactment are capable of being separated, and the valid part is a complete act, and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid; but if it is manifest, from an inspection of the law itself, that the invalid portion formed an inducement to its passage, the entire act will fall." This rule of construction has been so long recognized and so universally applied that it is now regarded as elementary law: State v. Poynter, 59 Neb. 417, 81 N. W. 431; Warren v. Mayor etc. of Charlestown, 2 Gray, 84; Pollock v. Farmers' Loan etc. Co., 158 U. S. 601, 15 Sup. Ct. Rep. 912. In the application of this rule, however, the court must take into consideration the various provisions of the organic law of the land where the statute is sought to be enforced.

The constitution prescribes the duties of the various coordinate departments of the state government. Each department is supreme within its proper sphere, and is subordinate only to the provisions of the organic act, which the people have adopted as the fundamental law, and the laws enacted in pursuance thereof. To the legislative department is delegated the [497] duty of providing the necessary revenue for the support of the state; and it is provided that the legislature shall provide this revenue, shall levy a uniform rate of taxation, shall prescribe such regulations as shall secure a just valuation of all property unless otherwise provided (Const., art. 12, sec. 1), that the power to tax corporations and corporate property shall never be relinquished or suspended (Const., art. 12, sec. 7), and taxes shall be uniform upon the same class of subjects: Const., art.

12, sec. 11. These provisions of the constitution are mandatory: Const., art. 3, sec. 29. It was the plain duty of the legislature to provide for the assessment and taxation of all the property of corporations situated within this state, as the word "property" is defined by the constitution itself: Const., art. 12, sec. 17.

The first part of this section (681) is a complete enactment within itself, without reference to the second part, and does not depend for its validity upon the second part, unless that was the inducement or compensation for the enactment of the first part of the section. In the enactment of the first part of this section the legislature provided for the taxation of a certain class of property, and provided a method of ascertaining its value. This was in accordance with constitutional provisions. In the last part of the section the legislature exempted certain other property from taxation. This was in contravention of constitutional provisions. Can this disregard of the constitution in the one instance be a sufficient inducement and compensation to render invalid and unconstitutional the obedience to the constitution in the other instance? Can a duty properly performed and completed with reference to one class of property be invalidated by a disregard of duty with reference to another class of property belonging to the same individual? If the matter of taxation were solely one of legislative discretion, not controlled as to duty of action and uniformity of levy and assessment by constitutional provisions, an exemption of one class or item of property might have the effect of an "inducement" or "compensation" for the taxation of another class or item, without [498] which "inducement" or "compensation" the law would not have been enacted at all. But here the fundamental law of the state commands action as to all property. The legislative inducement to this action is the constitutional command requiring it, and the necessity of providing a revenue for the support and maintenance of the state. The legislative compensation is duty performed and the protection and support of the state. The consent of the taxpayer is not necessary to the validity of a revenue law. The inducement or compensation which actuates him to pay the tax does not rest upon the exemption of a part of his property from taxation. That which induces the individual to pay taxes is not only his sense of duty, but the further fact that the law compels him to pay it. His compensation is the protection he receives from the state, which the tax he pays helps to support.

One of the cases chiefly relied upon by respondent is State v. Poynter, 59 Neb. 417, 81 N. W. 431. In this case the supreme court of Nebraska had under consideration the constitutionality of an act of the legislature providing for the organization, incorporation and taxing of insurance companies, and for their admission from other states. Sections 36 and 37 of the act were the only ones which provided for the payment of taxes, filing fees, and licenses by the corporations. These sections contained provisions similar to that found in the exemption clause of section 681 of our Civil Code; but an examination of this act of the Nebraska legislature will disclose the fact that its terms are somewhat different from that of the section of the Civil Code now under consideration. The court, in passing upon the case, says: "Section 36, chapter 47 of the Session Laws of 1899, provides that each domestic insurance company organized under said law shall be taxed upon the excess of premiums over losses and ordinary expenses incurred in the state during the preceding year, in the county where the agent conducts the business, properly apportioned by the company, at the same rate other personalty is taxed, and that the fees and taxes specified in said section shall be in lieu of all fees and [499] taxes, excepting those upon real estate and other taxes provided in the general revenue law; while by section 37 . . . . every other state insurance company shall pay certain fees, and in addition two per cent of their gross premiums, into the state treasury, and that the same 'shall be in full of all fees and taxes, except taxes on real estate, which may be imposed by any county, municipality or the state.' By these two sections all insurance companies are not taxed alike." The court then holds that sections 36 and 37 are unconstitutional, for the reason that they exempt property from taxation, and for the further reason that they violate the uniformity clause of the Nebraska constitution with reference to taxation. The court further holds that the entire act of which these sections are a part is void, for the reason "it requires no argument to demonstrate that chapter 47 of the Laws of 1899 would not have received the approval of the legislature, had it not contained any provision for the payment of fees and taxes by the insurance companies; and it is equally plain that the same amount of fees and taxes imposed by sections 36 and 37, and the requirement that the same should be paid into the state treasury, would not have been incorporated into the law, had the unconstitu-

tional provisions exempting insurance companies from taxation been eliminated from the bill."

It will be noticed that this Nebraska statute provided in part for the payment of a fixed sum to be levied and paid, without reference to the value of the companies' business, that it provided for the levy of taxes which were unequal between the two classes of insurance companies, that it also provided for the filing fees to be paid by the companies and for the payment of license by the companies, and that the provisions respecting all these various taxes and fees were so united as to constitute an entity; and the court therefore held that the entire sections were void, and that the act of which they were a part must necessarily be void, for the reason that it was apparent that the legislature did not intend to wholly exempt insurance companies from the payment of taxes. In the section of the law now 500 before us there is no commingling of different systems of taxation, nor is there any fixed or arbitrary amount of taxes named. The uniformity clause of the constitution is not violated.

In Slauson v. City of Racine, 13 Wis. 398, certain lands were annexed to the city of Racine under a provision that they should be exempt from a certain tax; and the court held that this exemption was void, and that, it appearing that that was the condition on which the lands were annexed to the city, the entire act providing for their annexation was void.

The exemption in this case was clearly an inducement to the parties owning the lands to permit them to be brought within a jurisdiction, and make them subject to ordinances, regulations and burdens which they did not bear before.

In State v. Duluth Gas etc. Co., 76 Minn. 96, 78 N. W. 1032, the court, in considering a statute providing for the listing and assessing for taxation of franchises and other intangible property of certain corporations, held that the provision of the section deducting the total amount of indebtedness of a corporation from the value of its stock was unconstitutional and void, but that the same did not invalidate the remaining part of the act. The court says, in part: "Again, while it cannot be denied that the legislature intended the provision for deducting the indebtedness from the value of the capital stock to be a part of the system of listing and assessing the property of these corporations, ... yet this provision is easily separable from other provisions of this section. What would remain would constitute a complete system of taxation, fully capable

of being executed in accordance with what we think was the apparent legislative intent. The fact that this void provision is in the same section with other provisions is not important, for the distribution into sections is purely arbitrary. The test is, rather, whether the provisions are so essentially and inseparably connected and interdependent that the one may not operate without the other, or that it is impossible to suppose that the legislature would have passed the one without the other. There is no such essential and inseparable connection [501] or interdependency in this case. The other provisions will operate, and can be executed, with this invalid provision stricken out. Neither is there anything to justify a court in holding that the legislature would not have enacted the statute with this obnoxious provision omitted. The evident intention was to reach for taxation the franchises and other intangible property of these corporations and associations as effectually and completely as possible."

We also cite the following cases where revenue laws have been held valid after the unconstitutional provisions attempting to exempt certain property from taxation were eliminated: People v. McCreery, 34 Cal. 432; People v. Whyler, 41 Cal. 351; City of Dubuque v. C. D. & M. R. R. Co., 47 Iowa, 216.

It is a fundamental rule that a reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity, and that the judiciary will not declare an act of the legislature unconstitutional unless it is clear that such act is inhibited by the fundamental law: University of California v. Bernard, 57 Cal. 612; Young v. City, 24 Utah, 321, 67 Pac. 1066; State v. Poynter, 59 Neb. 417, 81 N. W. 431; Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659. This section was incorporated in the general codification of the laws adopted in 1895, and it is reasonable to infer that it did not receive that specific consideration it would have received, had it been a part of a separate bill. Certainly no inference can be entertained that the legislature intended to enact a provision inhibited by the constitution, nor can it be maintained that an excessive tax has been imposed or levied on one class of property as an inducement for the exemption of another class, for the reason that no such authority is given or recognized by the constitution, and for the further reason that in this case no excessive tax is imposed or levied. This property is taxed "at the same rate that other personal property is taxed." The conclusion reached is that the part of section 681 of the Civil Code

providing for a tax "upon the excess of premiums received over losses and ordinary expenses incurred within the state" is not 502 rendered inapplicable to foreign mutual life insurance companies, unconstitutional, nor void, by reason of the unconstitutionality of that part of the same section exempting other property from taxation.

The other queries enumerated in the transcript are not discussed in the briefs, and are not noticed therein, except to be waived by appellant by reason of the decision in Mutual Life Ins. Co. v. Martien, 27 Mont. 437, 71 Pac. 470, decided since the commencement of this action.

The county of Lewis and Clarke being made the party defendant by stipulation, we have assumed, without deciding, that it is the proper party against whom the action should have been brought.

Under the views herein expressed, we are of the opinion that, omitting the last sentence, section 681 of the Civil Code is constitutional, has not been repealed, and does apply to foreign mutual life insurance companies doing business in this state. But the right to enforce the collection of this tax at the time this suit was commenced was dependent on the authority conferred by section 3940 of the Political Code; and, as this section has been declared unconstitutional in the case above cited, it follows that there was no authority vested in any officer or party in the county where the suit was instituted to collect this tax at that time, and that under the agreed case the plaintiff was entitled to a judgment in its favor for its costs.

We recommend that the cause be remanded, with directions to the district court to modify the judgment in accordance with the views herein expressed, and, when so modified, that it be affirmed.

Per CURIAM. For the reasons given in the foregoing opinion, it is ordered that this cause be remanded to the district court, with directions to enter judgment in accordance with the views therein expressed, and, upon the entry of the judgment as modified, the judgment appealed from be affirmed.

503 MILBURN, J. I concur; but I do not agree with all that is said as to the intention of the legislature at the time it passed the said section 681. I am not convinced that the legislature was not induced to put the income tax provided for in said section upon the companies in consideration of their

being made "subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law." I am in doubt, and I think reasonable, as to whether the unconstitutional sentence was the inducement for the taxing of the income; that is, "the excess of premiums received over losses and ordinary expenses," etc. Having such a doubt, I do not hold the statute unconstitutional: Young v. Salt Lake City, 24 Utah, 321, 67 Pac. 1066, citing many cases; People v. Van Gaskin, 5 Mont. 352, 6 Pac. 30..

Foreign Corporations cannot transact business in a state as a matter of right. The state may exclude them entirely, or impose such conditions upon them in admitting them to do business within its borders as it sees fit, provided matters of a federal nature are not thereby affected: State v. Hammond Packing Co., 110 La. 180, 34 South. 368, ante, p. 459, and cases cited in the cross-reference note thereto. A state may impose a license tax on a foreign corporation for the privilege of doing business within its limits: State v. Hammond Packing Co., 110 La. 180, ante, p. 459, 34 South. 368; Phoenix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143, 22 South. 627. In Southern Bldg. etc. Assn. v. Norman, 98 Ky. 294, 56 Am. St. Rep. 367, 32 S. W. 952, it is held that a statute requiring every foreign building and loan association doing business in the state to pay into its treasury two dollars for every one hundred dollars of its annual receipts is valid. It is permissible for a state to exact a license fee from a foreign corporation and also impose a tax on the business done: Scottish etc. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665. It is further held in this last case that a statute requiring all foreign insurance companies to pay to the state a certain percentage of premiums received on business done in the state is a tax on business, and not on property, and therefore not violative of a constitutional provision that the property of corporations shall be subject to taxation in like manner as that of individuals.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

COLWELL v. TINKER.

[169 N. Y. 531, 62 N. E. 668.]

BANKRUPTCY—Demands not Discharged by.—A Judgment for Criminal Conversation is for a willful and malicious injury to both the person and the property of a husband, and, by virtue of section 17 of the national bankruptcy act, is exempt from the effect of the discharge. (pp. 589, 591.)

Nelson Smith, for the appellant.

Thomas McAdam, for the respondent.

533 BARTLETT, J. The respondent recovered in the supreme court a judgment against the appellant on the ninth day of February, 1897, which was entered in the clerk's office of the county of New York, for fifty thousand six hundred and fifty-three dollars and ninety-eight cents damages and costs, in an action for criminal conversation with his wife. On the thirteenth day of September, 1899, the appellant was adjudicated a bankrupt on his own petition by the district court 534 of the United States for the southern district of New York. On the second day of February, 1890, the appellant was duly discharged. Section 17 of the bankruptcy act reads in part as follows: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as: 1. . . . . 2. Are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." Sec-

tion 1268 of the Code of Civil Procedure provides, in substance, that at any time after one year has elapsed since a bankrupt was discharged from his debts pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which it was recovered, an order must be made directing that it be canceled and discharged of record. When the bankrupt applied for his discharge to the United States district court, the respondent challenged the jurisdiction of the court on the ground that the only debt appearing in the schedules of the bankrupt was the judgment referred to in the action for criminal conversation, and, as that could not be discharged by proceedings in bankruptcy, the court was precluded from granting the discharge, as there was nothing for it to operate upon. The learned district judge, in sustaining the exception to this objection, held that the ordinary course of procedure in adjudging discharges is to grant the application if the bankrupt is otherwise entitled to the discharge without determining in any way the effect of its releasing any particular debt, whether contained in the schedules or not, and thereupon the discharge was granted. After the expiration of one year from the time of the discharge of the bankrupt, he applied for the cancellation of the judgment under section 1268 of the Code. The special term [535] denied the motion on the ground that the judgment was recovered for willful and malicious injuries to the person and property of another. The appellate division affirmed this order, but with leave to appellant to renew the application upon such additional papers as may be advised. This leave to renew was based upon the view entertained by the learned court that nothing was before them to show upon what the verdict against the appellant was based except a general allegation that it was an action for criminal conversation, and that the real nature of the action could not be determined unless the judgment record was before the court, as an action for criminal conversation does not necessarily involve malice against the plaintiff. It is therefore important to determine what is implied by a judgment entered upon the verdict of a jury finding the defendant guilty of criminal conversation with the plaintiff's wife. Section 3343 of the Code, subdivision 9, defines a "personal injury" to be, among other

things, criminal conversation. As this is a mere legislative definition of a personal injury, for the guidance of the courts in this state, it may be regarded for the purposes of this discussion as of no binding force in the determination of the federal question now presented. It is very clear upon principle and authority that criminal conversation is a willful and malicious injury to both the person and the property of the husband. In the recent case of In re Freche, 6 Am. Bank. Reg. 479, 109 Fed. 620, the United States district court of New Jersey held that a judgment in a father's action for the seduction of his daughter, under the law of New Jersey, is one for the willful and malicious injury to the person and property of another, within the meaning of section 17 of the bankruptcy act, and is not released by a discharge. The learned district judge in his opinion uses this language: "The judgment recovered in this case in the state court is based upon the theory of compensating the plaintiff for the injuries which he had sustained to his person or property or both. From the nature of the case, the act of the defendant, Freche, [536] which caused the injury, was willful, because it was voluntary. The act was unlawful, wrongful, and tortious, and, being willfully done, it was in law malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant, Freche, must be presumed to have had in mind when he committed the offense. 'Malice' in law simply means a depraved inclination on the part of a person to disregard the rights of others which intent is manifested by his injurious acts. While it might be true that in the unlawful act Freche was not actuated by hatred or revenge or passion toward the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice": See, also, United States v. Reed, 86 Fed. 308, 312. The husband's right to the services of his wife is a right of property. In Cregin v. Brooklyn C. R. R. Co., 75 N. Y. 192, 31 Am. Rep. 459, Judge Rappallo, speaking of this right, said: "He had the right to the services of his wife. They were of pecuniary value to him, and any wrong by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests": See, also, the same case reported in 83 N. Y. 595, 38 Am. Rep. 474. On principle

criminal conversation with the wife is a personal injury to the husband, without regard to the statutory declarations to that effect in this state. While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society. It strikes at the foundations of the home and the legitimacy of offspring. The husband, who is entitled to live with his wife, and enjoy her society in the marriage relation, finds himself humiliated, and, to a certain extent, disgraced, by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed, and he is subjected to great mental suffering. [537] In Bromage v. Prosser, 4 Barn. & C. 247, Bayley, J., writing in an action for words spoken of the plaintiffs in their trade and business as bankers, said: "'Malice,' in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." If there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be in an action for criminal conversation, where a jury has awarded the injured husband damages in the sum of fifty thousand dollars. The defendant alleges this recovery in his petition upon which this proceeding is founded. In many causes of action it is apparent that, to determine whether an act is willful or malicious, the surrounding circumstances must be considered; but in an action for criminal conversation, the fact of criminal intercourse being established, malice in law must follow, and the circumstances are important only on the question of damages. A person voluntarily invading and destroying the marriage relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge, or passion toward the husband. The law in such a case implies malice, and the judgment that follows is for both a willful and malicious injury to the person and property of another. The policy of the bankrupt law is to discharge the honest and unfortunate debtor from his contract obligations, and not free him from judgments involving his fraud, which implies moral turpitude or intentional wrong, or judgments for willful and malicious injuries to the person or property of another. In the case of In re Cotton, 2 N. Y. Leg. Obs. 370, Fed. Cas. No. 3269, the court, in commenting on this latter class of cases, said: "In all of these cases it is held that the payments provided for by the judgments and decrees are of penalties or fines imposed for

wrongful or criminal acts, or to enforce a moral or natural duty, rather than of the nature of debts": See, also, In re Blumberg, 1 Am. Bank. Reg. 634, 94 Fed. 476.

538 The real nature of this action is sufficiently apparent from the petition of the defendant. The order of the special term, in denying the defendant's motion that the judgment in this action be canceled and discharged of record, protects the defendant, as it is without prejudice to any right he may have to prosecute an action to procure a determination of the effect of the discharge in bankruptcy upon the said judgment, or otherwise test the validity of the discharge as a release of said defendant from said judgment.

The order of the appellate division should be affirmed, with costs to the plaintiff.

Parker, C. J., and Gray, O'Brien, Haight, Cullen and Werner, JJ., concur.

The Judgment in the Principal Case was subjected to a writ of error to the supreme court of the United States, where it was affirmed, Justices Brown, White and Holmes dissenting. The opinion of a majority of the court was by Mr. Justice Peckham, and is as follows:

"The question herein arising is whether the judgment obtained against the defendant, petitioner, for damages arising from the criminal conversation of the defendant with the plaintiff's wife, is released by the defendant's discharge in bankruptcy, or whether it is excepted from such release by reason of subdivision 2, section 17, of the bankruptcy act of July 1, 1898, which provides that 'a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another': 30 Stats. at Large, 550, c. 541; U. S. Comp. Stats. 1901, p. 3428.

"The averment in the petition that the judgment was not recovered for a willful and malicious injury to the person or property of the plaintiff in the action is a mere conclusion of law, and not an averment of fact.

"If the judgment in question in this proceeding be one which was recovered in an action for willful and malicious injuries to the person or property of another, it was not released by the bankrupt's discharge; otherwise it was.

"We are of opinion that it was not released. We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and

invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault, even when, as is almost universally the case as proved, the wife in fact consents to the act; because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful. A judgment upon such a cause of action is not released by the defendant's discharge in bankruptcy.

"The assault vi et armis is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children.

"Subsequently the action of trespass on the case was sustained for the consequent damage, and either form of action was thereafter held proper.

"Blackstone, in referring to the rights of the husband, says (3 Blackstone's Commentaries, Wendell's ed., 139): 'Injuries that may be offered to a person considered as a husband, are principally three: Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. . . . . 2. Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary.'

"Speaking of injuries to what he terms the relative rights of persons, Chitty says that for actions of that nature (criminal conversation being among them) the usual, and, perhaps, the more correct, practice, is to declare in trespass vi et armis and contra pacem: 1 Chitty on Pleading, 2d ed., 150, and note h.

"In Macfadzen v. Olivant, 6 East, 387, it was held that the proper action was trespass vi et armis, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost and was deprived of her comfort, society, and fellowship, against the peace and to his damage. Lord Ellenborough, C. J., among other things, said:

" 'Then the question is, whether this can be an action on the case or an action of trespass and assault. And it is said that the latter description only applies to personal assaults on the body of the plaintiff who sues; but nothing of that sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant per quod servitium amisit;

and so by a husband for a trespass and assault of this kind upon his wife per quod consortium amisit.'

"In Rigaut v. Gallisard, 7 Mod. 78, Lord Holt, C. J., said that if adultery be committed with another man's wife, without any force, but by her own consent, the husband may have assault and battery, and lay it vi et armis, and that the proper action for the husband in such case was a special action, quia—the defendant his wife rapuit, and not to lay it per quod consortium amisit.

"In Haney v. Townsend, 1 McCord, 206, decided in 1821, it was held that case as well as trespass vi et armis is a proper action for criminal conversation, the court holding that no doubt trespass was a proper form of action for the injury done by seducing a wife, but that case was also a proper action.

"In Bedan v. Turney, 99 Cal. 649, 34 Pac. 442, decided in 1893, it was held that the criminal intercourse of the wife with another man was an invasion of the husband's rights, and it was immaterial whether this invasion was accomplished by force or by the consent of the wife; that the right belonged to the husband, and it was no defense to his action for redress that its violation was by the consent, or even by the procurement, of the wife, for she was not competent to give such consent; that it was not necessary that the husband should show that it was by force or against her will. The original form of the action was trespass vi et armis, even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in Rigaut v. Gallisard, 7 Mod. 78, 'that the law will not allow her consent in such case to the prejudice of her husband.'

"In McClure v. Miller, 11 N. C. (4 Hawks) 133, note, page 140, trespass was held to be the proper form of action in such a case, and that a single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it. It is also said that the husband has, so to speak, a property in the body and a right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband.

"For the purpose of maintaining the action, it is regarded as an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife, and it is in this view (that it is a trespass upon the rights of the husband) that it is held that the consent of the wife makes no difference; that she is incapable of giving a consent to an injury to the husband: 7 Mod. 78.

"In Wales v. Miner, 89 Ind. 118, decided in 1883, it was held that in an action of criminal conversation the wife was incapable of consenting to her own seduction so as to bar her husband's right of action.

"In Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307, it was held the action could be maintained whether the conversation was

with or without the consent of the wife, and although the act caused no actual loss of the services of the wife to the husband.

"Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right.

"In Delamater v. Russell, 4 How. Pr. 234, it was held that the act complained of (criminal conversation) was an injury to the person of the plaintiff; that it was an invasion of his personal rights, and although the action was brought for depriving the plaintiff of the comfort, society, fellowship, aid, and assistance of the wife, yet it was an action brought for an injury to, and an invasion of, the plaintiff's personal rights.

"The plaintiff in error refers to the case of Cregin v. Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459, same case upon second appeal, 83 N. Y. 595, 38 Am. Rep. 474, for the purpose of showing that the right to the society of the wife is not property, and therefore cannot be regarded as within the words of the bankruptcy act. The case does not decide that the right to the wife's society and comfort is not a property right on the part of the husband. It was a case brought by the husband against the railroad company for injuries negligently inflicted on the person of his wife by the company, and after the action was brought the husband died; and an application was made to revive the action in the name of the administrator of the husband. The court held that the action survived under the provisions of the state statute: 2 Rev. Stats., p. 447, sec. 1. The case then went to trial, and the judge submitted to the jury the question of damages arising from the loss of the services of the wife and of her society, and it was held to be error by the court of appeals, because, while the right to the services of the wife was property, the right to her society, etc., was not property within the meaning of the statute providing for the survival of the cause of action, for the reason that the statute only provided for the survival of those rights the loss of which diminished the estate of the deceased; that the loss of the services of the wife did diminish the estate of the deceased, but that the loss to the husband of the wife's society and aid, etc., did not diminish his estate, and therefore the right of action consequent thereon did not survive the deceased. The question in the case at bar neither arose nor was referred to in the opinions delivered in that case.

"We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to

the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband.

"We think such an act is also a willful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute.

"There may be cases where the act has been performed without any particular malice toward the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

"In order to come wihin that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

"In Bromage v. Prosser, 4 Barn. & C. 247, which was an action of slander, Mr. Justice Bayley, among other things, said: 'Malice, in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not, and whether I intend to do him any injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not.'

"We cite the case as a good definition of the legal meaning of the word 'malice.' The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned.

"In In re Freche (United States district court, district of New Jersey, 1901), 109 Fed. 620, it was held that a judgment for the father in an action to recover damages for the seduction of his daughter was for a willful and malicious injury to the person and property of another within the meaning of section 17 of the bankrupt act, and was not released by a discharge in bankruptcy. Kirkpatrick, district judge, in the course of his opinion said: 'From the nature of the case, the act of the defendant Freche, which caused the injury, was willful, because it was voluntary. That act was unlawful, wrongful, and tortious, and, being willfully done, it was, in law, ma-

licious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must be presumed to have had in mind when he committed the offense. "Malice," in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it may be true that in his unlawful act Freche was not actuated by hatred or revenge or passion toward the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice.'

"In Leicester v. Hoadley (1903), 66 Kan. 172, 71 Pac. 318, it was held that a judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment debtor under proceedings in bankruptcy where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

"It was further held that injuries so inflicted are willful and malicious, and are to the person and property of another, within the meaning of section 17 of the United States bankrupt law.

"In United States v. Reed, 86 Fed. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury, and is done intentionally, may be said to be done willfuly and maliciously, so as to come within the exception.

"It is urged that the malice referred to in the exception is malice toward the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury, without special malice toward the individual, has been held by some courts not to be sufficient: Commonwealth v. Williams, 110 Mass. 401. * *.

"We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged.

"Howland v. Carson, 28 Ohio St. 625, is cited by plaintiff in error. The question arose under the old bankruptcy act, which provided (U. S. Rev. Stats., p. 5117) that no debt created by fraud or embez-

zlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, should be discharged by proceedings in bankruptcy, etc. It was held in the case cited that a judgment for the seduction of his daughter in favor of the father, where the seduction was not induced or accomplished under a promise of marriage fraudulently made for the purpose, was not a debt created by fraud, within the meaning of the bankruptcy act. We do not perceive the least similarity in the case to the one now before the court, nor could we say that such a debt was one created by fraud.

"It is also argued that, as the fraud referred to in the exception is not one which the law implies, but is a particular fraud involving moral turpitude or intentional wrongdoing, so the malice referred to is not a malice implied in law, but a positive and special malice upon which the cause of action is founded, and without proof of which the action could not be maintained. It is true that the fraud mentioned in the bankruptcy statute of 1867 (14 Stats. at Large, 517, c. 176) has been held to be a fraud involving moral turpitude or intentional wrong, and did not extend to a mere fraud implied by law: Hennequin v. Clews, 111 U. S. 676, 681, 4 Sup. Ct. Rep. 576; Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. Rep. 623. The reason given was that the word was used in the statute in association with a debt created by embezzlement, and such association was held to require the conclusion that the fraud referred to meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not a fraud which the law might imply and which might exist without the imputation of bad faith or immorality.

"Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the court in the above-cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action such as the one before us, the malice which is implied is of that very kind which does involve moral turpitude. This case is not, therefore, controlled in principle by the above-cited cases.

"People v. Greer, 43 Ill. 213, is also cited. The court there did hold that, under the Illinois insolvent law, an insolvent debtor was discharged from a judgment obtained by the father for the seduction of his daughter. The law discharging the debt extended by its terms to all tort-feasors except where malice was the gist of the action, and the court said malice was not the gist of the action in question. The case is not opposed to the views we have already expressed.

"It is not necessary in the construction we give to the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a

crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious. It might be conceded that the language of the exception could be so construed as to make the exception refer only to those injuries to person or property which were accompanied by particular malice, or, in other words, a malevolent purpose toward the injured person, and where the action could only be maintained upon proof of the existence of such malice. But we do not think the fair meaning of the statute would thereby be carried out. The judgment here mentioned comes, as we think, within the language of the statute, reasonably construed. The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice toward the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit such an injury to be released by a discharge in bankruptcy.

"An action to redress a wrong of this character should not be taken out of the exception on any narrow and technical construction of the language of such exception.

"For the reasons stated, we think the order of the court of appeals of New York must be affirmed."

For Other Recent Decisions under the bankruptcy act, see Matter of Hellman, 174 N. Y. 254, 95 Am. St. Rep. 582, 66 N. E. 809; Bernhardt v. Curtis, 109 La. 171, 94 Am. St. Rep. 415, 33 South. 125; Dunbar v. Dunbar, 180 Mass. 170, 94 Am. St. Rep. 623, 62 N. E. 248; Old Town Bank v. McCormick, 96 Md. 341, 94 Am. St. Rep. 577, 53 Atl. 934; note to Tremblay v. Aetna Ins. Co., 94 Am. St. Rep. 555-557; State v. Superior Court, 28 Wash. 35, 91 Am. St. Rep. 826, 68 Pac. 170. In trover, the discharge of the defendant in bankruptcy pending the action cannot be set up as a defense: Berry v. Jackson, 115 Ga. 196, 90 Am. St. Rep. 102, 41 S. E. 698.

CROSSMAN v. LURMAN.

[171 N. Y. 329, 63 N. E. 1097.]

CONSTITUTIONAL LAW—Interstate Commerce—Adulterated Articles.—Chapter 839 of the act of Congress of 1890, declaring it to be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous or malt liquors, adulterated or mixed with any poisonous or noxious chemical, conceding it to be intended to prohibit only adulterated articles which are injurious to the public health, does not contain any provision authorizing the importation of articles which are adulterated for the purpose of deceiving or defrauding purchasers or consumers, and therefore does not conflict with the statute of New York upon these subjects. (p. 603.)

CONSTITUTIONAL LAW—Interstate Commerce, Right of the State to Prohibit the Sale of Articles Adulterated by Coloring.—The statute of New York prohibiting any person from having, or offering for sale, any adulterated drug or food, and declaring that an article must be deemed adulterated if it is colored, coated, polished or powdered, whereby a defect is concealed, or it is made to appear better than it really is, or of greater value, is constitutional, though applied to articles imported from a foreign country. (p. 604.)

Frederick B. Kellogg and Arthur J. Baldwin, for the appellants.

Charles Stewart Davison, for the respondents.

330 HAIGHT, J. This action was brought to recover the damages sustained by the plaintiffs by reason of the refusal of the defendants to accept certain coffees tendered to them under an executory contract dated July 7, 1894. The contract, so far as is material upon the question which we shall discuss, is as follows: "Sold for account of Messrs. W. H. Crossman & Brothers to Messrs. Theo. G. Lurman & Co., Baltimore, Md., about 250 No. 8, 250 No. 9. Five hundred (500) bags Rio coffee (sound and made sound portion), to be shipped at Rio de Janeiro by Str. 'Catania.'" The contract contains other provisions with reference to grading under the rules of the Coffee Exchange of New York, the price to be paid, and for determining the grade by arbitrators if a difference arises with reference thereto between the parties. When the coffee arrived it was tendered to the defendants, and the No. 8 was accepted, but that graded as No. 9 was rejected as colored and damaged, and far below the grade purchased, and the plaintiffs were asked to substitute other coffee. This coffee was subsequently sold by the plaintiffs on account of the defendants for a less sum than the con-

tract price, and this action was brought to recover the difference. The defendants interposed the defense that the coffee was adulterated, colored, coated, polished, and powdered, whereby damage was concealed, and the coffee made to appear better than it really was, and of greater value, in contravention of the provisions of chapter 661 of the Laws of 1893 of New York. Upon the issue raised, the case was tried before a jury; and upon such trial the sole question submitted to the jury was as to whether the coffee in question was colored, coated, or powdered, whereby the damage was concealed, or it was made to appear better than it really was, or of greater value. The verdict [331] was in favor of the defendants, and the judgment entered thereon was unanimously affirmed by the appellate division.

It is now contended on behalf of the plaintiffs that the statute alluded to is in contravention of the commerce clause of the constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign countries and among the several states of the Union. The statute in question, so far as material, provides as follows: "Sec. 41. Adulterations. No person shall within the state manufacture, produce, compound, brew, distill, have, sell, or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act . . . . in case of food . . . . (6) if it be colored, or coated, or polished, or powdered whereby damage is concealed or it is made to appear better than it really is or of greater value." By the law of Congress of 1890 (chapter 839) it was provided (section 2) "that it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous or malt liquors, adulterated or mixed with any poisonous or noxious chemicals, drug or other ingredient injurious to health." And then follow provisions adjudging offenders guilty of a misdemeanor, and providing for their punishment. It may be that this law was only intended to prohibit importations of food or drugs which had been adulterated with articles which were injurious to public health, but it contains no provision authorizing the importation of articles which are adulterated for the purpose of deceiving and defrauding purchasers and consumers. We think, therefore, it cannot be held to be in conflict with the statute of this state. The states have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States,

and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and therefore the states cannot prohibit the sale of articles of commerce within their borders. [332] The states cannot, under the guise of inspection, or under their reserved police powers prohibit the importation into their jurisdictions of sound meat under the pretense that it may be damaged or decayed, or Texan cattle for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated: Railroad Co. v. Husen, 95 U. S. 465; Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757. But to this power delegated to Congress there exist certain exceptions. The articles of commerce must be merchantable and of the character represented. The states, under the police powers reserved to them, may inspect and reject that which would be injurious to the public health or public morals and that which was designed to cheat or defraud the people. They may consequently inspect meats, and exclude such as has become damaged and unwholesome. They may inspect Texan cattle, and exclude those that are in fact diseased. They may inspect spirituous or malt liquors, and exclude such as are adulterated with poisonous or noxious chemicals injurious to public health. And they may inspect oleomargarine, and exclude that which is colored in imitation of yellow butter and represented to be such. In the case of Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, Mr. Justice Matthews, in delivering the opinion of the court, says: "Doubtless the states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable. They are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and [333] life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such

exercise of power cannot be considered regulations of commerce prohibited by the constitution." In Railroad Co. v. Husen, 95 U. S. 465, it was held that while a state cannot, beyond what is absolutely necessary in self-protection, interfere with the transportation into or through its territory of articles of commerce, it may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering its territory. Mr. Justice Strong, in delivering the opinion of the court, says: "We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in Thorpe v. Rutland etc. R. R. Co., 27 Vt. 149, 62 Am. Dec. 625, 'it extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state.' . . . . Under it a state may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge as well as persons afflicted by contagious or infectious diseases. . . . . The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state—for example, animals having contagious or infectious diseases." In the case of Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, Mr. Justice Harlan, in considering the statute of Pennsylvania prohibiting the sale of oleomargarine as imitation butter, says: "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of [334] the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment"—referring to the constitution of the United States. In the case of Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757, Mr. Justice Peckham, in holding that the statute of Pennsylvania was unconstitutional in absolutely prohibiting the manufacture and sale of oleomargarine, says: "In the execution of its police powers, we admit the right of the state to enact such legislation as it

may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state."

In the case of Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, it was held that a statute of that state to prevent deception in the manufacture and sale of imitation butter, in its application to the sales of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, is not in conflict with the clause of the constitution of the United States investing Congress with the power to regulate commerce among the several states. Mr. Justice Harlan, in delivering the opinion of the court in that case, says: "The statute seeks to suppress false pretenses, and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which in fact is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles—even those that may have become the subject of trade in different parts of the country?" He then proceeds to show by a consideration of the cases that the constitution of the United States does not prohibit the states from enacting laws [335] to prevent fraud and deception in the sale of articles of commerce. It appears to us that this case cannot, in principle, be distinguished from the action we have before us for determination, and that it settles the question as to the validity of our statute. The right of a state, under the police powers reserved, to enact laws to prevent fraud and deception in the sale of articles of food, as well as to preserve the public health, is not only conceded by these authorities, but expressly held to exist. The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered, and black beans. It, confessedly, was colored, and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to hide the character of the poor

beans, and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions, or made it to appear better than it really was, or of greater value, to the ordinary, untrained observer—in other words, that it was adulterated for the purposes of fraud and deception. This, we think, the legislature had the right to prevent.

We have considered the other questions discussed upon the argument of this appeal, but have reached the conclusion that there were no errors committed which were prejudicial to the appellants, or of sufficient importance to require a new trial.

The judgment should be affirmed, with costs.

Parker, C. J., and Bartlett, Martin, Vann, Cullen and Werner, JJ., concur.

Judgment affirmed.

The Judgment in the Principal Case was affirmed by the supreme court of the United States. Its opinion, by Mr. Justice White, is as follows:

"The law of the state of New York contained the following:

" 'Sec. 41. Adulterations.—No person shall, within the state, manufacture, produce, compound, brew, distill, have, sell, or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this act, ... in the case of food, ... (6) if it be colored or coated, or polished or powdered, whereby damage is concealed, or it is made to appear better than it really is or of greater value': N. Y. Laws 1893, c. 661, sec. 41, being N. Y. Gen. Laws, c. 25.

"With these provisions in force, in July, 1894, the firm of Crossman & Brothers, hereafter referred to as the sellers, residents of New York city, by contract made in New York, sold to the firm of Theodore G. Lurman & Co., hereafter referred to as the buyers, residents of Baltimore, five hundred bags of Rio coffee, one-half the bags to be No. 8 grade, and the other half No. 9 grade. It was stipulated that the coffee was to be shipped from Rio Janeiro to New York city by a designated steamer, the coffee to be sound or to be made sound by the sellers. The grades 8 and 9 referred to in the memorandum of sale were standard types, bearing those numbers, established by the Coffee Exchange of the city of New York, and it was agreed that the coffee was to be of the average of such types, and differences arising on the subject were to be determined by a 'grader,' to be selected by each of the parties, the two to select a third in the event of a disagreement, his decision to be conclusive. It was stipulated that on the arrival of the steamer and

the storage of the coffee in New York, the buyers were to have the advantage of the first month's storage and the fire insurance, free of expense.

"In due time the named steamer reached the port of New York, and the five hundred bags of coffee were stored and delivery tendered in New York city to the buyers. Some of the coffee was accepted, and the remainder was rejected, on the ground that it was adulterated, because it had been artificially colored by coating the beans with a yellow wash. Without going into the details of what transpired between the parties as a result of the refusal to accept the coffee, it suffices, for this case, to say that ultimately the graders provided for in the contract were named, and on their disagreement a third was selected, who decided that, although the coffee had been coated with the wash, it average quality was yet equal to the specified types of the Coffee Exchange referred to in the contract. The buyers refused to abide by this finding, and to accept delivery and pay for the adulterated coffee. The sellers then disposed of the coffee for account of the buyers, and commenced this suit to recover the difference between the amount produced by the alleged sale and the contract price. During the course of the litigation two trials were had, and the cause was twice passed on by the appellate division of the supreme court in and for the first judicial department. On the first hearing in the supreme court it was held, in accord with a decision of the court of appeals of the state of New York, rendered in a collateral controversy which grew out of the refusal to accept the coffee (In re Lurman, 149 N. Y. 588, 44 N. E. 1125), that if the coffee was adulterated, within the statute of the state of New York, the buyers were not bound to accept, despite the finding of the grader that it conformed to the types of the Coffee Exchange, referred to in the contract. Finally, all incidental questions being eliminated, the cause was tried on the distinct issue whether the coffee was adulterated within the provisions of the statute. There was a verdict and judgment for the buyers, which was affirmed by the appellate division of the supreme court in and for the first judicial department. The cause having been then taken to the court of appeals of the state of New York, the court affirmed the judgment of the supreme court, and remitted the record to that court: 171 N. Y. 329, ante, p. 599, 63 N. E. 1097. Because of such remittitur this writ of error to the supreme court is prosecuted to review the judgment of the court of appeals.

"Concerning the facts of the case, the court of appeals said (171 N. Y. 335, ante, p. 603, 63 N. E. 1100): 'The coffee tendered by the plaintiffs, which was rejected, was of a low grade, containing many poor, withered, and black beans. It, confessedly was colored and the beans coated with a yellowish substance. It is not contended that the coloring matter improved the taste or added to the value of the coffee. It is claimed that the only purpose of the coloring was to

hide the character of the poor beans and to make them appear of the same character as the good coffee. The jury has found by its verdict that it was so colored as to conceal the damaged portions, or made it to appear better than it really was, or of greater value to the ordinary, untrained observer. In other words, that it was adulterated for the purpose of fraud and deception.'

"Applying the provisions of the health laws of the state of New York concerning the adulteration of food products already referred to, it was decided that the court below had correctly held that there was no obligation on the part of the buyer to take delivery and pay for the coffee if fraudulently colored in violation of the prohibitions of the statute. Coming to consider the contention of the sellers, that the provision of the law of the state in question was repugnant to the commerce clause of the constitution of the United States, the court of appeals said (171 N. Y. 331, ante, p. 600, 63 N. E. 1098): 'The states have no power to regulate commerce with foreign countries or with each other. This power has been delegated to the Congress of the United States, and that body can, by law, determine what shall or shall not be permitted to be imported. With the right of importation follows the right of sale in original packages, and, therefore, the states cannot prohibit the sale of articles of commerce within their borders. The states cannot, under the guise of inspection, or under their reserved police powers, prohibit the importation into their jurisdictions of sound meat, under the pretense that it may be damaged or decayed, or Texas cattle, for fear they may be diseased, or spirituous or malt liquors for fear that they may intoxicate, or oleomargarine for fear it may be adulterated' : Hannibal etc. Ry. Co. v. Husen, 95 U. S. 465; Bowman v. Chicago Ry. Co., 125 U. S. 465, 1 Int. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 3 Int. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757.

"Having thus fully conceded the plenary operation of the constitution of the United States upon interstate and foreign commerce, the court proceeded to decide that the statute of the state of New York which it upheld was not repugnant to the commerce clause of the constitution, because the state, in its enactment, but exerted its reserved police power to legislate for the protection of the health and safety of the community, and to provide against deception or fraud. In support of this theory the court cited from the decisions of this court, to which it had referred, as showing the general rule, and additionally fortified its conclusion by reference to, and citations from, the opinion of this court in Plumley v. Massachusetts, 155 U. S. 461, 5 Int. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

"All but three of the many propositions embraced in the assignment of errors and urged at bar rest on the contention that the court of appeals misconceived the extent of the police power of the

state, and therefore erroneously decided that the law of the state of New York which was applied to the case was not repugnant to the commerce clause of the constitution of the United States. We shall not at any length undertake to review the argument made at bar to sustain this proposition, since its unsoundness will be more fully demonstrated by a mere reference to the previous decisions of this court, upon which the court below based its conclusions. Indeed, every contention here urged to show that the law of New York is repugnant to the constitution of the United States was fully and expressly considered and negatived by the decision of this court in Plumley v. Massachusetts, 155 U. S. 461, 5 Int. Com. Rep. 590, 15 Sup. Ct. Rep. 154. In that case, a law of the state of Massachusetts forbidding the sale of oleomargarine, which was artifically colored, was applied to a sale in Massachusetts of an original package of that article which had been manufactured in, and shipped from, the state of Illinois. In the course of a full review of the previous cases relating to the subject it was said (155 U. S. 472, 5 Int. Com. Rep. 600, 15 Sup. Ct. Rep. 158):

"'If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally. affect trade in such products transported from one state to another state. But that circumstance does not show that the laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. For, as said by this court in Sherlock v. Alling, 93 U. S. 99, 103: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution. . . . . And it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or intérstate, or in any other pursuit."'

"Again, it was said (155 U. S. 478, 5 Int. Com. Rep. 606, 15 Sup. Ct. Rep. 160):

"'And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that

it is a particular article of food in daily use, and eagerly sought by people in every condition of life, are protected by the constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artifically colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to anyone the privilege of defrauding the public.'

"The assertion that the statute of the state of New York which the court below applied is repugnant to the commerce clause of the constitution of the United States being thus shown to be devoid of merit, there remains only to be considered the three propositions to which we have previously adverted. We shall briefly consider and dispose of them.

"1. It is insisted that, even although it was in the power of the state of New York to legislate for the prevention of fraud and deception by forbidding the sale of adulterated food products, such prohibition could only operate upon contracts made within, or intended to be executed within, the state, and as the contract here in controversy was not of such character, therefore the law of the state of New York was erroneously held to control. This proposition is based on the assumption that because the buyers of the coffee were residents of Maryland, therefore the contract must be treated as having been made for the purpose of securing the shipment of the coffee from Rio Janeiro to the residence of the buyers, hence the city of New York was referred to in the contract merely as the port of entry. It is insisted, per contra, that this proposition was not relied upon at the trial, nor called to the attention of the court of appeals of the state of New York, and should not be now considered, because if it had been raised below it would have been met by proof showing that the buyers, although residents of Maryland, were engaged in carrying on a business for the sale of coffee in New York city. The suggestion that the proposition was not made below is borne out by the fact that it was not referred to by the court of appeals of the state of New York or in the several opinions handed down by the supreme court of the state of New York during the course of the protracted litigation which the cause has engendered. Be this as it may, however, we think the proposition is devoid of merit. The contract of sale was made in New York; the storage and delivery in the city of New York was therein provided for. It was clearly, therefore, a New York contract, and governed by the law of New York

"2. It is urged that, even although there was power in the state of New York to legislate on the subject of adulteration of food, such legislation ceased to be operative as regards food products imported into the United States through the channels of foreign commerce after the passage of the act of Congress approved August 30, 1890, 'providing for the inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases': 26 Stats. at Large, p. 414, c. 839; U. S. Comp. Stats. 1901, p. 3185. The second section of that act, it is insisted, does not exclude from importation adulterated food, but simply adulterated food which is mixed with any poisonous or noxious chemical, drug, or other ingredient injurious to health, which, it is urged, was not the case with the coffee in question. The language of the section upon which this contention is based is as follows:

" 'That it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous, or malt liquors, adulterated or mixed with any poisonous or noxious chemical, drug, or other ingredient injurious to health.'

"We think it unnecessary to determine whether the statute lends even color to the proposition, since we think it is clear that its effect, whatever be its import, was not to deprive the state of its police power to legislate for the benefit of its people in the prevention of deception and fraud, and thus to control sales made within the state of articles so adulterated as to come within the valid prohibitions of the state statute.

"3. In the trial court the plaintiff tendered evidence to demonstrate that there was a demand in some portions of the country for artificially colored coffee, and, to the ruling of the court excluding such testimony as irrelevant, exception was saved. Although the court of appeals, in its opinion, did not make any special reference to the subject, it is insisted that the question was called to its attention, and that, in affirming the judgment, it in effect sustained the action of the trial court in excluding the testimony, and thereby deprived the plaintiff of rights secured under the constitution of the United States. The effect of the evidence, it is argued, had it been admitted, would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, and therefore the right to deal in it was protected by the commerce clause of the constitution of the United States, and such dealings could not, therefore, be controlled by the state law. To state the proposition we think is to answer it.

"It, moreover, is disposed of by the decisions of this court to which we had previously referred. Besides, the question which the case involved was the right of the sellers to contract for and deliver in the state of New York an article so adulterated and fraudulent as to be within the prohibitions of the law of New York. Further, the proof

tending to show that coffee so adulterated and artificially colored as to be the convenient means of accomplishing fraud and deceit was in demand in some places outside of the state of New York could have no legitimate tendency to cause the adulterated and fraudulently deceptive article to become legitimate commerce.

"Affirmed."

Whether the Commerce Clause of the federal constitution prohibits the several states from prescribing regulations for the coloring of food products, and taking other precautions for preventing the practice of fraud on buyers and consumers of dairy products, is considered in the note to State v. Rogers, 85 Am. St. Rep. 402, 403. A statute prohibiting the manufacture and sale of process butter, unless marked "Renovated Butter," does not, in its application to foreign products, contravene the federal constitution: Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376. And a statute prohibiting the manufacture and sale of "any substance or compound made in imitation of yellow butter, and not made wholly of cream or milk," is held constitutional, though intended to prohibit the sale of such products imported from other states and sold in the original packages: State v. Rogers, 95 Me. 94, 85 Am. St. Rep. 395, 49 Atl. 564.

PEOPLE v. KNIGHT.

[171 N. Y. 354, 64 N. E. 152.]

CONSTITUTIONAL LAW—Interstate Commerce, What is not. A Cab Service maintained in the city of New York by a foreign railway corporation to transport to and from various points within that city its passengers who are conveyed to and from the city by a ferry from the railway terminus of the corporation in another state, such cab service both beginning and ending within the city, is not incidental to, nor any part of, interstate commerce, and the capital employed in making such service is not exempt from taxation imposed by sections 182 and 184 of the laws of 1896, chapter 908, relating to franchise taxes upon corporations. (pp. 611, 618.)

Petition for a writ of certiorari to review and annul an order of the state comptroller assessing taxes against the relator, the Pennsylvania Railroad Company, on property and business of the relator incident to its cab service in the city of New York. The relator was a foreign corporation chartered by the state of Pennsylvania. The cab service was employed to transfer its passengers and their baggage between its ferry landing in New York City and their residences or hotels in the same city. The appellate division affirmed the decision of the comptroller, and the relator appealed.

Henry Galbraith Ward, for the appellant.

John C. Davies, attorney general, and Henry B. Coman, for the respondent.

355 CULLEN, J. I agree with Judge Bartlett that the only question presented on this appeal is whether the business carried on by the relator, and for which a franchise tax has been imposed, is interstate commerce or not. For, though it may be that the state of New York could levy a franchise tax on the gross earnings of a foreign corporation for the privilege given it of running a cab line within this state, even for the purposes of interstate commerce (see Maine v. Grand Trunk R. Co., 142 U. S. 217, 12 Sup. Ct. Rep. 121, cited with approval in Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. Rep. 599), section 184 of 356 our tax law excludes earnings derived from business of an interstate character from liability to the tax. I insist, however, that the transportation for which the relator has been taxed is not interstate commerce. It is not rendered under any contract for transportation from a point within the state to a point without the state, or vice versa, but is solely a carriage between two points within the state under a separate contract. As pointed out by the appellate division, the use of the relator's cabs is not restricted to those who have previously secured transportation to or from some point on its railroad, nor is such use confined to travelers upon the railroad. Such a traveler may be accompanied by a friend to or from the ferry only, and one intending to travel upon the railroad may change his intention when he reaches the ferry. It is first to be observed that the fact that the relator is a foreign corporation has no effect on the question whether its cab service is interstate commerce or not. A domestic corporation or an individual citizen of this state may engage in interstate commerce as well as any foreign corporation. Transportation from the city of New York to the town of Port Chester is domestic, not interstate, commerce, because both places are in this state, although the transportation is performed by a foreign corporation—the New York and New Haven Railroad Company. Transportation from the city of New York to Paterson, New Jersey, is interstate commerce, although it is over the road of a New York corporation, the Erie Railway Company. Therefore, it is the character of the service, not the character of the carrier, that determines whether the transportation is interstate commerce or not. If in the instance suggested by counsel, when a person intending

to travel to Washington takes one of the relator's cabs to carry him from the Fifth Avenue Hotel to the relator's ferry station, that transportation is interstate commerce, it is necessarily equally so when he is carried by a cab called from the hack stand in Madison Square opposite. A carrier may engage in both interstate commerce and in domestic commerce, but that fact does not determine the character of the carrier's whole [357] business, or change what would otherwise be domestic commerce into interstate commerce, or vice versa. The fact, therefore, that cabs from the ordinary stands take passengers to any part of the city does not affect the character of their service when they carry passengers to railway or ferry stations within the state on journeys to points without the state. Nothing is better settled by the decisions of the supreme court of the United States than that in the case of interstate transportation the legislature cannot prescribe the charge to be made for even that part of the transportation which is to be performed within the state: Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4. Hence, if the doctrine contended for by the relator is correct, the city of New York has no right to prescribe the fares to be charged by public hacks or cabs for transporting travelers to the ferries on the North river except when the traveler intends to take passage to some point in the state of New York, nor for taking travelers to the Grand Central Station when such travelers are journeying to Boston or to the west.

If this cab service can in any way become part of interstate commerce (of which there may be some doubt, as I shall show by the authorities), I insist it can only be such when the service is rendered under an entire contract for continuous carriage to or from some point without the state. It may be that there is no case in the supreme court of the United States which directly decides this proposition. But there is no authority to the contrary, and there are a number of cases in that court which seem to recognize this as the true test of what transportation constitutes interstate commerce. The question has been presented in litigations arising under the interstate commerce act with reference to railroad companies whose roads lay entirely within a single state. Of such a case the supreme court said in Cincinnati etc. R. R. Co. v. Interstate Commerce Com., 162 U. S. 184, 16 Sup. Ct. Rep. 700: "It may be true that the Georgia Railroad Company, as a corporation of the state of Georgia, and whose entire road is within that state, may not be legally compelled to submit [358] itself to the provisions of the act of Congress, even

when carrying, between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the state of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the federal act in respect to such interstate commerce." So, in Louisville etc. R. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. Rep. 209, it was held that the fact that "the several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston," rendered the traffic interstate commerce, even as to that part of it performed by a carrier furnishing transportation wholly within a single state. If this be the true doctrine as to the transportation of property, I do not see why it is not equally the true doctrine as to the transportation of persons.

I have suggested that there was some doubt whether, under the authorities, the relator's cab service could become a part of interstate commerce. In Munn v. Illinois, 94 U. S. 113 (Chicago elevator cases), in answer to the claim that the warehouses and elevators were instrumentalities of interstate commerce, it was said by the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as [359] those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it

may indirectly operate upon commerce outside its immediate jurisdiction." In Coe v. Town of Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475, it was said: "'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced: The Daniel Ball, 10 Wall. 565.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." In the recent case of Detroit etc. Ry. Co. v. Interstate Commerce Com., 43 U. S. App. 308, 21 C. C. A. 103, 74 Fed. 803, it was held that the cartage of goods by the railroad company to and from the station for shippers and consignees was not within the interstate commerce act. It is there said: "We cannot think that, under the circumstances, it was the intention of Congress to confuse in our legislation the carting to and from the stations with the transportation on the rails, and, if the act can be interpreted to avoid that confusion, it should be done. We may suppose, since with us it is a business done almost exclusively by outsiders, and rarely by the railroad companies, and, being usually done wholly within the territorial limits of a state, is not within the jurisdiction of Congress, that it was not intended to interfere with it, except so far as it might affect directly the transportation of goods between the states, by being used as a device to evade the jurisdiction over that subject." This [360] case was affirmed by the supreme court in 167 U. S. 633, 17 Sup. Ct. Rep. 986, which expressed its approval of the view of the court below "that the railway transportation ends when the goods reach the terminus or station, and are there unshipped, and that anything the company does afterward, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage."

There remain to be considered two cases on which the relator largely relies as authorities for its contention. The first is a case of this relator in this court, reported in 138 N. Y. 1, 33 N. E. 720. There it was held that a franchise tax could not be imposed on the relator for capital invested in its ferry station and terminal grounds in the city of New York, although the property itself was subject to taxation. At that time the business of the relator, so far as it was prosecuted within this state,

was confined to the operation of a ferry from Jersey City to New York, and to the maintenance at the latter place of its wharves, ferry-house, and terminal facilities. The case was unquestionably properly decided under the doctrine declared in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826. There the plaintiff, a New Jersey corporation, ran a ferry from Gloucester, in that state, to Philadelphia. It had no property in the latter city, other than a wharf which it leased; its steamboats were registered in New Jersey. A tax imposed by the state of Pennsylvania upon the dividends of all corporations doing business within the state was held illegal as against that company. Judge Field said: "As to the second reason given for the decision below—that the company could not lease its wharf in Philadelphia, except by the implied consent of the legislature of the commonwealth, and thus is dependent upon the commonwealth to do its business, and therefore can be taxed there—it may be answered that no foreign or interstate commerce can be carried on with the citizens of a state without the use of a wharf or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a state to impose a tax upon the capital of all corporations engaged in foreign or [361] interstate commerce for the use of such places would be inconsistent with, and entirely subversive of, the power vested in Congress over such commerce." It is contended that no distinction can be drawn between the right of the relator to transport its passengers by ferry to the city of New York across the waters of the Hudson, which are within the limits of this state, and its right to transport passengers by cabs to and from points in the city of New York. I insist that there is a marked distinction between the two rights, and that the distinction is recognized in all the cases in the supreme court of the United States which deal with the subject. In Baltimore etc. R. Co. v. Maryland, 21 Wall. 456, it was urged that transportation on land was governed by the same principle as transportation by water, and exempt to the same extent from state control. The court decided against this contention, and it was held: "Commerce on land between the different states is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt, commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace com-

merce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." The foregoing extract from the case cited was quoted with approval in Pullman's Palace Car Co. v. Pennsylvannia, 141 U. S. 18, 11 Sup. Ct. Rep. 876. The navigable waters of the United States, even when they lie [362] exclusively within the limits of a state, are open to all the world, except so far as Congress may prescribe to the contrary; and it requires no leave or license from a state (except compliance with its police regulations, and possibly payment of tolls imposed to defray the cost of improvements in navigation) for a vessel to journey on those waters. Not so on the land. No one can construct and operate a turnpike or railroad within a state unless by grant from the state or by the authority of Congress under its constitutional power to establish post roads.

The second case relied on by the appellant is The Daniel Ball, 10 Wall. 557. In that case, the question was whether a steamboat engaged in navigating Grand river, Michigan, wholly within that state, was required to take out a license in compliance with the provisions of the United States statute. Some articles of freight carried by the vessel were marked for points without the state, though it did not appear that they were being transported under any agreement for continuous transportation to such points. It was held that the steamer was engaged in interstate commerce, and subject to the regulations of Congress. Doubtless this case would be an authority for the position of the relator, had not the court been careful to say, "The present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation." In Lord v. Steamship Co., 102 U. S. 541, the question was as to the application of an act of Congress limiting the liability of ship owners to the case of a vessel navigating the high seas between ports of the same state. It was held that the transportation was subject to congressional regulation.

In that case, there appears to have been found no freight destined to points without the state. So it was necessary to place the decision on a different ground from that on which the decision in The Daniel Ball rested. It was held that, while Congress had no control over the internal commerce of the state, still the vessel, when navigating the Pacific Ocean, [363] though between two ports of the same state, was engaged in commerce with foreign nations, and was subject to the regulating power of Congress. Ex parte Garnett, 141 U. S. 1, 11 Sup. Ct. Rep. 840, presented the question again. There a steamer was engaged in the carrying trade between Augusta and Savannah, both on the same river in the state of Georgia. The petitioner, a shipper of goods between these two points, alleged that the ship owner's liability was not subject to limitation by the act of Congress. The case did not fall within the principle of the decision in The Daniel Ball, or of that in Lord v. Steamship Co., 102 U. S. 541. It was held that the shipment was subject to the act of Congress, not because it was any part of interstate or foreign commerce, but by virtue of "the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States," which extends to all public navigable waters. In Lehigh Val. R. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. Rep. 806, it was contended that the state of Pennsylvania had no power to tax the plaintiff on transportation over its railroad from one point in the state to another, where, for a part of the distance, a passenger was carried through another state. Reliance was placed by the plaintiff in error on the decision of the court in Lord v. Steamship Co., 102 U. S. 541. It is difficult to see why, if transportation from one point in a state to another was foreign commerce, because the vessel furnishing the transportation navigates the high seas in its voyage between those places, the same principle would not render transportation by railroad from one point to another in the same state, where the line of the railroad for a part of the distance lay in another state, interstate commerce. The court, however, held that it was not interstate commerce, and, while upholding the decision in the Lord case, practically repudiated the ground on which the decision had been placed. Of the Lord case the court said: "But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in Ex parte Garnett, 141 U. S. 1, 12, 11 Sup. Ct. Rep. 840, 842: 'The act of Congress [364] which limits the liability of ship owners was passed in amendment of the mari-

time law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but in maritime matters it extends to all matters and places to which the maritime law extends.' " It will thus be seen that the control of Congress over ships, vessels, and the navigation of public waters has finally been placed by the supreme court of the United States on the solid foundation of the maritime and admiralty jurisdiction of the federal government, and that, while the decisions actually made in the Daniel Ball and Lord cases remain the law, the grounds on which they proceeded are no longer deemed tenable, and the opinions rendered in those cases no longer authorities.

In closing, reference should be made to the recent decision of this court in People v. Morgan, 168 N. Y. 1, 60 N. E. 1041. That case, so far from being in conflict with the views I have expressed, is a direct authority for the proposition that the liability of a carrier corporation to a franchise tax on its transportation depends not on the question whether the carrier is a domestic or foreign corporation, but on the character of the transportation itself.

The order appealed from should be affirmed, with costs.

From the Opinion of the Majority of the court, Justice Bartlett dissented. The opinion of the court was, however, affirmed by the supreme court of the United States, whose views were expressed by Mr. Justice Brewer as follows:

"The contention of the company is that this cab service is merely an extension, and therefore a part of its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing, or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination; that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company. In other words, the company, to promote its general business, seeks only to complete the continuous transportation of interstate passengers to or from their residences or hotels in New York City instead of commencing and ending such transportation at the ferry landing at Twenty-third street; the character of the service depends not on the action of the passenger, but on the purpose

of the company in providing it, and the omission to include the charge for the cab service in the charges for other transportation arises from the practical difficulty of making such inclusion, and does not alter the fact that such cab service is a part of the interstate transportation.

"To hold the even balance between the nation and the states in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate, and assign the relation or transaction to the control of the nation or of the state, is often most perplexing. And this case fully illustrates the perplexities.

"It is true that passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business: Atlantic etc. Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. Rep. 817. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

"Undoubtedly a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is in interstate carriage. By reason thereof the nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from state regulation and state taxation, for a part of its work is carriage and transportation begun and ended within the state. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service which is wholly performed within the state, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation: Osborne v. Florida, 154 U. S. 650, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. Rep. 494.

"As we have seen, the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside, the state; and unless the interstate character is established, locality determines the question of jurisdiction. Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475, though not in all respects similar, is very closely in point. In that case spruce logs had been drawn down from Wentworth's Location in New Hampshire, and placed in Clear Stream, also in New Hampshire, to be from thence floated down the Androscoggin river to the state of Maine, there to be manufactured and sold. After they had thus been drawn down and placed in Clear Stream, a tax was imposed upon them by the state of New Hampshire. The validity of that tax was challenged on the ground that the logs were in process of transportation from Wentworth's Location in New Hampshire to the state of Maine. It was sustained by the supreme court of New Hampshire, and also by this court. In the course of the opinion of Mr. Justice Bradley are these pertinent observations (116 U. S. 528, 6 Sup. Ct. Rep. 479):

"'It is true, it was said in the case of The Daniel Ball, 10 Wall. 557, 565: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing': Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 Sup. Ct. Rep. 266; Detroit etc. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803, 167 U. S. 633, 17 Sup. Ct. Rep. 986.

"As shown in the opinion from which we have just quoted, many things have more or less relation to interstate commerce which are

not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

"We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the supreme court of the state of New York was correct, and it is affirmed."

The Constitutionality of state regulations of interstate commerce is discussed in the monographic note to People v. Wemple, 27 Am. St. Rep. 547-566. As to what constitutes commerce, see the recent cases of Saulsbury v. State, 43 Tex. Cr. Rep. 90, 96 Am. St. Rep. 837, 63 S. W. 568; State v. Northern Pac. Exp. Co., 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404; Western Union Tel. Co. v. Reynolds, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856; Gray v. Telegraph Co., 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063; Croy v. Obion County, 104 Tenn. 525, 78 Am. St. Rep. 931, 58 S. W. 235.

WANAMAKER v. WEAVER.

[176 N. Y. 75, 68 N. E. 135.]

HUSBAND AND WIFE, His Liability for Goods Purchased by Her.—Though goods purchased by a wife on her husband's credit from a person with whom she has not been accustomed to trade are of the class ordinarily called necessaries, he may show, in his defense, that she was amply supplied with articles of like character, or that she had been furnished with ready money with which to pay cash therefor. The question of her agency to act for him is one of fact and is not a conclusion of law, to be drawn alone from the marital relation. (pp. 626, 627.)

Action against a husband for goods furnished his wife. The judgment of the trial court was in favor of the defendant, but it was reversed by the appellate division of the fourth judicial department. From the judgment of reversal an appeal was taken to this court.

Charles Van Voorhis, for the appellant.

Harry Otis Poole, for the respondent.

76 HAIGHT, J. This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's

77 knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that while the goods might ordinarily be deemed necessaries, they were not in fact such, for the reason that the defendant lived on a salary of two thousand dollars per year, out of which he delivered to his wife fifteen hundred dollars in monthly installments of one hundred and twenty-five dollars with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible unless there is some affirmative proof of actual authority, outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question, as to whether the plaintiff gave credit to the defendant, or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made, submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and, therefore, the 78 articles were not necessary for her support and maintenance. The majority of the judges of the appellate division appear to have entertained the view that, if the articles purchased by the wife were of the character ordinarily deemed necessaries, such as clothing, table linen, towels and napkins, the merchant was at liberty to furnish her therewith and charge her husband therefor, without re-

gard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase."

It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of Kellar v. Phillips, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of Cromwell v. Benjamin, 41 Barb. 558, the general term sustained the right of a merchant to recover of the defendant for the necessaries furnished to his wife. J. C. Smith, J., in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessaries furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this, upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to [79] the wife, so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessaries himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries." In Bloomingdale v. Brinckerhoff, 2 Misc. Rep. 49, 49 N. Y. St. Rep. 142, 20 N. Y. Supp. 858, it was held that in order to entitle the tradesman to recover from the husband it was incumbent upon him to show "the articles supplied to the wife were not only of the kind usually denominated necessaries, because their need is common to all persons, but that in consequence of the inadequacy of the husband's provision they were actually required for the wife's proper sup-

port, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessaries, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where the question appears to have been more thoroughly considered in the higher courts. In the case of Debenham v. Mellon, L. R. 5 Q. B. Div. 394, Bramwell, L. J., in stating the question involved, says: "The goods were necessaries in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessaries in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable. As for instance, where he turns his wife out of doors, or conducts himself in such manner as to oblige her to leave him, she may provide herself at his expense and pledge his credit for necessaries, such as food, apparel, lodging and medicine. In case they are living and cohabiting together and there has been a custom of contracting short credit as to a class of [80] articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relations as the head of his household; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable. The same case was subsequently brought up for review in the house of lords (L. R. 6 App. Cas. 24). Lord Chancellor Selborne then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that "according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her—but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no

prima facie evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing." The second question considered by the lord chancellor was whether the law implied such a mandate from the fact of cohabitation. Upon this point he says: "If, therefore, the law did imply any such mandate from cohabitation, it must be an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some prima facie evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, ... because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent [81] to acts, which hold the wife out as his agent for certain purposes. . . . . But where there has been nothing done, nothing consented to by the husband to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound, but the question must be examined as one of fact and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption prima facie, and not absolute; not a presumption of law, but one capable of being rebutted." The chancellor then proceeds to consider the facts in the case and concludes by holding the husband not liable, stating that: "It was argued that because these articles were found to be in some sense necessaries in their nature the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it; much less can he be bound in a case like this where they were not living apart and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing."

In the still more recent case of Morel Brothers & Co., Ltd., v. Earle of Westmoreland (1903), L. R. 1 K. B. 64, it was held that the presumption which arises that the husband has given the wife authority to pledge his credit for necessaries may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses. In this case Mathew, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of [82] agency and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases, but if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife, section 107, sums up the authorities upon the subject as follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessaries, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessaries shall come, and that so long as he has provided necessaries in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessaries at his own home he is not liable to provide them elsewhere. In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject see 10 Cent. L. J. 341; 54 Cent. L. J. 472; 18 Am. Law Reg., N. S., 412-416 (Judge Bennett's note); 20 Am. Law Reg., N. S., 324 (Judge Bennett's note); Clark v. Cox, 32 Mich. 204.

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the

wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection aginst the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in the alarm which appears to have possessed the learned justices of the appellate division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before and where consequently there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The judgment of the appellate division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

Gray, Vann, Cullen and Werner, JJ., concur.

Parker, C. J., dissents.

Martin, J., absent.

IMPLIED AUTHORITY OF WIFE TO ACT FOR HUSBAND AND CHARGE HIM FOR NECESSARIES.

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I. Agency of Wife Generally.

a. Authority to Bind Husband.—If a married woman possesses power in any case to bind her husband by her contracts made on his behalf, it must be by virtue of an authority derived from him and founded upon his consent. She has, as wife, no original or inherent power to make a contract obligatory upon him. But while the marital relation, of itself, creates no such authority in her, it does not incapacitate her to be constituted, by her husband, his agent, and to act as such equally with any other person. His assent to the agency may be precedent or subsequent, express or implied; and when he confers the authority upon her, the relation between them and the consequences of that relation are analogous to those in the ordinary case of principal and agent: Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Casteel v. Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; McKee v. Kent, 24 Miss. 131; Sawyer v. Cutting, 23 Vt. 486. The agency, its nature and extent, and whether it includes the particular contract, may, as in other cases, be inferred from a variety of circumstances. It is a question for the jury whether she had authority to make the contract in question, or whether her act, unauthorized at the time of its performance, has

been validated by his ratification: Savage v. Davis, 18 Wis. 608. If the authority is express, her authority, as in other cases of agency, must be measured by the terms employed in conferring it; if it is implied, its extent must be gathered from all the circumstances of the case: Jones v. Gutman, 88 Md. 355, 41 Atl. 792. But while a wife may act as agent for her husband, where she does so and makes an express contract in writing, she can bind him by such contract only by executing the same in his name, professedly as agent, as in the case of all other agents: Galusha v. Hitchcock, 29 Barb. 193.

b. **Presumptions and Burden of Proof.**—A married woman, whether her husband is absent or at home, sick or in health, is not presumed to be his agent generally, or to be intrusted with authority in respect to his affairs, other than that which is usual and customary to confer upon the wife: Sawyer v. Cutting, 23 Vt. 486. But an agency may be more readily presumed from the acts and condition of a wife than in ordinary cases: Shelton v. Pendleton, 18 Conn. 417, 422; Brown v. Woodward, 75 Conn. 254, 260, 53 Atl. 112. While they are living together, the law presumes that she has authority to purchase necessaries and supply ordinary household wants, and that purchases and contracts made by her for these purposes are made as his agent: Gotts v. Clark, 78 Ill. 229; Bonney v. Perham, 102 Ill. App. 634; Powers v. Russell, 26 Mich. 179; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759; Keller v. Phillips, 39 N. Y. 351; Bradt v. Shull, 61 N. Y. Supp. 484, 46 App. Div. 347; Williams v. Coward, 1 Grant Cas. 21. And the burden of proof is on him to show that he has made suitable provision for her: Tebbets v. Hapgood, 34 N. H. 420. On the other hand, if a husband and wife are living apart permanently, the presumption of authority on her part to bind him for necessaries ceases. For necessaries furnished under such circumstances the burden of proof is on the tradesman to show that the wife was in need of such goods, that the husband failed to supply her, and that she was not at fault, or that he authorized or assented to the purchase: Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Bonney v. Perham, 102 Ill. App. 634; Olson Co. v. Youngquist, 76 Minn. 26, 78 N. W. 870; Bostwick v. Brower, 49 N. Y. Supp. 1046, 22 Misc. Rep. 709; Hatch v. Leonard, 75 N. Y. Supp. 726, 71 App. Div. 32.

In passing upon a case of this kind, the court, in Peaks v. Mayhew, 94 Me. 571, 48 Atl. 572, says: "The jury might have found that the defendant had furnished a comfortable home for his wife and supplied her with all the necessaries suitable to her situation and his own circumstances and condition in life, and that she abandoned this home and lived apart from her husband without fault on his part, against his will, and without justifiable cause. Under such circumstances, it is a well-settled and elementary principle in the law of domestic relations, requiring no citation of authorities for its support, that a wife who thus willfully deserts her husband

without just cause, at the same time forfeits all right to have her maintenance and support from him, and carries with her no authority to pledge his credit even for articles which might be essential to her health, comfort, and support, and therefore properly deemed necessaries for which the husband would be liable if she had left for his fault. But, by a willful violation of duty on her own part, she relieves her husband from the observation of the marital obligation which would otherwise rest upon him. There is no rule of law or principle of justice which would raise a presumption of agency in favor of a wife to enforce an obligation on the part of her husband which for her own fault has ceased to exist. In case of the wife's desertion of her husband, the presumption changes to the side of the husband, and the burden is upon the plaintiff who seeks to recover for necessaries furnished the wife, with knowledge of the separation, to show that they either lived apart by mutual consent, or that the separation was occasioned by the fault or misconduct of the husband."

"Where the husband and wife are living in a state of separation," say the court in Vusler v. Cox, 53 N. J. L. 516, 22 Atl. 347, "the presumption is against the authority of the wife to bind the husband by her contract. Under such circumstances the general rule is that the husband is not liable. To this rule are two exceptions pertinent to this inquiry, the first of which is where husband and wife separate and live in a state of separation by mutual consent, without any provision for her maintenance or means of her own for her support; the other, where the wife leaves her husband under the stress of his misconduct of such a character as in law is regarded as a justifiable cause for the wife's quitting her husband's society. In such cases, the presumption being against the liability of the husband for the wife's contract, the burden of proof is upon the party seeking to enforce against him a liability for her contract. He must show affirmatively the special circumstances which shall fix the responsibility on the husband in order to establish his cause of action."

II. Circumstances Affecting Wife's Authority.

a. Absence of Husband.—The authority of a wife to act for her husband may, perhaps, be somewhat extended by the fact that he is away from home. Thus, it has been held that in the absence of a toll-gatherer his wife may be deemed his agent for the purpose of demanding and receiving tolls: Marselis v. Seaman, 21 Barb. 319; and that during the absence of a husband in the Confederate army, his wife has authority to employ ordinary means of defense to a proceeding for the confiscation of his property: Buford v. Speed, 11 Bush (Ky.), 388. A husband is bound by the acts of his wife in respect to his property during his absence, unless he disavows them within a reasonable time: Hill v. Sewald, 53 Pa. St. 271, 91 Am.

Dec. 209. If a wife, during her husband's absence, usually acts as his agent, borrows money and buys property with it, which subsequently he claims, he is bound to repay the borrowed money: Burk v. Howard, 13 Mo. 241. Evidence that when a man, leaving home for three months, leaves his farm and everything thereon in charge of his wife, with directions for her to take care of everything the same as he would if at home, shows an express delegation of authority to her to take charge of the livestock: Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

A wife of any absent debtor has power as his general agent, so it is held in Felker v. Emmerson, 16 Vt. 653, 42 Am. Dec. 532, to bind him by her consent that hay attached on his farm may be fed to his cattle, also attached, where he has left her at home on the farm with several minor children, giving no other person charge of his affairs, and has been absent several months before the attachment. For other cases where a wife in charge of her husband's property during his absence has been regarded as his agent, see Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419; Moore v. Simpson, 5 Litt. (Ky.) 49. It would certainly be far from the truth to suppose a wife to be the general agent of her husband merely from the fact of his absence. "The law will, in some cases, presume the wife to be the agent of her husband, when no such presumption would exist as to another person; and also will, in some cases, imply a larger authority to the wife than to an ordinary agent; and this, perhaps, whether the husband is absent from home or not; and that, in other cases, where he is absent, a presumption would arise that his wife has authority to act in his behalf which would not exist if he were at home. But it will be found that in all such cases these inferences are founded on the fact that it is usual and customary to permit the wife to act in such cases. It is a presumption arising from the state of society": Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384. In this case it is held that the implied authority of a wife left in charge of her husband's farm to manage and superintend the same during his absence from the state, does not enable her to bind him by an agreement to permit a creditor having an attachment against him to cut, remove and sell on execution, grass growing on the land, and that, notwithstanding such agreement, the husband may maintain trespass against the creditor. Where a wife, during her husband's absence, continues his business and sells a part of the furniture and fixtures, taking notes payable to herself, these circumstances do not constitute presumptive evidence of her authority to transfer the notes: Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312. A wife has no authority, during her husband's absence, to license a search of his house for stolen goods: Humes v. Taber, 1 R. I. 464. In case a man is temporarily away from home for only a day or two, the law raises no presumption that his wife is his agent: Bates v. Cilley, 47 Vt. 1; Savage v. Davis, 18 Wis. 608.

b. **Infancy or Lunacy of Spouses.**—A husband is liable for necessaries furnished to his wife, without regard to his infancy: Cole v. Seely, 25 Vt. 220, 60 Am. Dec. 258; or without regard to his insanity, except where provision has been made for the maintenance of his family through a committee of his estate or otherwise: Thedford v. Reade, 54 N. Y. Supp. 1007, 25 Misc. Rep. 490. And a husband is liable for necessaries furnished his wife while she is confined in an insane asylum: Wray v. Cox, 24 Ala. 337. The wife of an insane person cannot, to the prejudice of other creditors, transfer his property to pay a particular creditor: Alexander v. Miller, 16 Pa. St. 215.

c. **Prior Conduct or Course of Business.**—It has already been seen that where a husband and wife are living together, the law raises a presumption that she is authorized to make contracts for the supply of articles suitable and necessary to their means and station of life. This presumption is strengthened when he, by previous dealings, permits her to exercise this power and acquiesces therein. When he thus permits her to be held out as his agent, there is no doubt of his liability for her contracts in relation to necessaries, until he gives notice that the agency is terminated: Watts v. Moffett, 12 Ind. App. 399, 40 N. E. 533; Chaix v. Villejoin, 7 La. 276; Sterling v. Potts, 5 N. J. L. 773. And the same is true as to contracts other than for necessaries: Howe v. Finnegan, 70 N. Y. Supp. 19, 61 App. Div. 610; Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964. If a man has held his wife out as his agent by paying for goods which she purchases of a certain firm, he will be answerable for goods so purchased after she leaves him without cause, where the firm is not chargeable with notice of the separation: Anthony Cowell & Co. v. Phillips, 17 R. I. 188, 20 Atl. 933. And when a husband gives a merchant reasonable grounds to believe that his wife is authorized to buy goods, he may safely sell her such goods as are fairly within range of such authority, notwithstanding she makes the purchase with intent to live apart from her husband and apply the goods to her personal use: Hudson v. Sholem, 65 Ill. App. 61. When a wife, who has no power to contract for the purposes of trade, buys goods with knowledge and without the dissent of her husband, in order to carry on a business, she will be deemed the agent of her husband, and he will be held liable for the debt: Boas v. Malone, 140 Pa. St. 572, 21 Atl. 447.

d. **Ratification by Husband.**—Since a wife may be the agent of her husband, if he permits her to so act in any transaction, a subsequent acknowledgment or ratification of her acts is, as in other cases of principal and agent, evidence of and equivalent to an orignal authority: Shaw v. Emery, 38 Me. 484; Singleton v. Mann, 3 Mo. 464; Hopkins v. Mollinieux, 4 Wend. 465. Thus, a payment to a creditor's wife may be made good by ratification: Willingham v. Simons, 1 Desaus. (S. C.) 272. And where a wife, during the absence

of her husband, rents a house for a year, and on his return a few days later he resides with her until near the end of the month, when he pays the rent for the month, and then moves out, he is liable for the rent for the entire term: Berwick v. Dusenberry, 32 How. Pr. 348. So, where a woman writes to a nurse to secure her services and her husband continues the correspondence, and sends her his mileage-book, so that she can pay her fare to his residence, the contract is that of the husband, and the wife is not liable thereunder: Winkler v. Schlager, 64 Hun, 83, 19 N. Y. Supp. 110.

If a husband allows his wife to wear articles in his presence and with his knowledge, which ordinarily he would be liable for as necessaries, and he makes no objection, he is liable to pay for them, for his permission to retain and enjoy them without objection is equivalent to a ratification of the purchase: Ogden v. Prentice, 33 Barb. 160; Graham v. Schleimer, 59 N. Y. Supp. 689, 28 Misc. Rep. 535; see also, Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713, where a husband who does not repudiate his wife's contract for a set of teeth is held liable thereon. A promise by a man to pay for necessaries supplied to his wife, although she had no previous authority to purchase them, amounts to a ratification of the transaction, notwithstanding the promise is accompanied by a direction to sell her no more goods on credit: Conrad v. Abbott, 132 Mass. 330. And although a husband and wife are living separate from each other, he may ratify her unauthorized purchases: Mickelberry v. Harvey, 58 Ind. 523; Allen v. Aldrich, 29 N. H. 63; Hartjen v. Ruebsamen, 43 N. Y. Supp. 466, 19 Misc. Rep. 149; McKinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522.

A woman cannot bind her husband to pay for goods which she buys for her daughter by a former marriage; and a promise by him to pay for them, without any new consideration, is not binding: Gaffield v. Scott, 40 Ill. App. 380. See, also, Menefee v. Chesley, 98 Iowa, 55, 66 N. W. 1038.

e. **Married Women's Statutes.**—Under the statutes enlarging the powers of married women to make contracts and transact business, it is competent for a wife to bind herself personally on contracts in relation to household matters and necessaries. These statutes, however, do not alter the common-law rule that she is presumed to have authority to act for her husband in such matters, and that she is presumed to act in pursuance of such authority and not on her own account: Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759; Webber v. Spannhake, 2 Redf. Sur. (N. Y.) 258. Such statutes do not affect the right of a woman to pledge her husband's credit for necessaries when she is compelled, by his misconduct, to live apart from him, although she is possessed of means sufficient to supply her reasonable wants: Ott v. Hentall, 70 N. H. 231, 47 Atl. 80. And a statute giving a wife a right to sue for separate maintenance does not affect the right of one who furnishes

her with necessaries to recover from her husband therefor: Seybold v. Morgan, 43 Ill. App. 39.

III. Authority in Particular Transactions.

a. In Relation to Property.

1. **Sales, Conveyances and Exchanges.**—While a wife may be the authorized agent of her husband to sell his property (Jones v. Jones, 3 Strob. (S. C.) 315), she ordinarily has no authority, by reason of the marital relation, to dispose of his property either by sale or exchange: Dunnahoe v. Williams, 24 Ark. 264; Brown v. Hannibal etc. R. R. Co., 33 Mo. 309. And this is true, although the property in question is a sewing-machine kept in the house and exclusively used by her: Wheeler & Wilson Mfg. Co. v. Morgan, 29 Kan. 519. A man is not bound by a contract for the sale of his land, which is made by a broker in accordance with letters and telegrams sent by his wife, when she has no written authority to contract for him: Edwards v. Tyler, 141 Ill. 454, 31 N. E. 312. Perhaps a power to dispose of her husband's property may arise by implication when he absconds with an intent never to return: Butts v. Newton, 29 Wis. 632. Under the facts of this case, however, the Wisconsin court denied that such power existed as to the property involved. But it has been held that a wife may sell her husband's property to obtain means for her necessary support: Ahern v. Easterby, 42 Conn. 546. It appears in this case that the husband had committed an assault and battery upon his wife, and on being committed to jail for several months took his money with him, and made no provision for her support. She became sick and destitute, and sold his cooking-stove to secure money to relieve her wants. Undoubtedly, a sale made by a wife of her husband's property may be made valid by his subsequent approval and ratification. That a deserted wife may sell her husband's property to obtain means of support, see the note to Buford v. Adair, 64 Am. St. Rep. 862. A husband cannot stand by and see his wife use the proceeds of a sale of his property sold by her with his knowledge, and afterward reclaim it: Delano v. Blanchard, 52 Vt. 578.

2. **Loaning and Hiring.**—A wife has no authority to lend her husband's goods in the absence of evidence of any circumstances from which it may be inferred that she is authorized to act as his agent, and the borrower neglecting to return the property on demand is liable for its conversion: Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519. It has been held, however, that she may, when he is away from home, hire out his horse, and that trover does not lie for the animal, unless it is shown that he constituted some other person his agent to take charge of his property during his absence: Church v. Landers, 10 Wend. 79. The soundness of this decision, to our mind, is not entirely free from doubt: See, in this connection, "Absence of Husband," ante.

3. **Leases and Rents.**—A wife, as such, has no authority to make a lease of her husband's real estate: Mulford v. Young, 6 Ohio, 294. But when she can be considered as his agent, her receipt of rents are his receipts: Smith v. Stockbridge, 39 Md. 640. Where a man who is absent from his family knows that his wife is keeping a boarding-house to support herself and children, and he does not return nor make any provision for them, but permits her to continue the business and rent a house for that purpose, without expressing any dissent, he is liable for the rent of such house: Rotch v. Miles, 2 Conn. 638. The employment of a real estate agent to rent the premises in which the family lives is not within the scope of the ordinary agency of a wife, and special authority or ratification must be shown: Harper v. Goodall, 10 Daly, 269.

4. **Other Property Matters.**—A married woman has no authority by law, without the consent of her husband, to give an irrevocable license to enter upon his real estate: Nelson v. Garey, 114 Mass. 418. And in the absence of proof it cannot be inferred that she is authorized to take possession of the premises, or to give authority to remove and convert the property of another: Essington v. Neill, 21 Ill. 139. A tenant in common who makes an agreement with the wife of his cotenant that he shall have the sole occupation of the land, and pay a certain amount therefor, cannot maintain an action for such occupation, if he does not show that the cotenant had actual knowledge of the contract, or that he authorized his wife to make it: Wilbur v. Wilbur, 13 Met. (Mass.) 404. Repairs made on a man's house, under the direction of his servant, and with the knowledge and approval of his wife would seem to be within her implied authority to pledge her husband's credit for necessary household expenses: Wennerstrom v. Kelly, 27 N. Y. Supp. 326, 7 Misc. Rep. 173.

b. **Negotiable Instruments.**—A negotiable note given or indorsed by a wife cannot be given in evidence against her husband, unless it is shown that she acted by his authority, expressed or implied: Reakert v. Sanford, 5 Watts & S. (Pa.) 164; Leeds v. Vail, 15 Pa. St. 185. But her indorsement of commercial paper, with his consent or authority, will bind him: Hancock Bank v. Joy, 41 Me. 568; Stevens v. Beal, 10 Cush. (Mass.) 291, 57 Am. Dec. 108; Prestwick v. Marshall, 7 Bing. 565. The general common-law rule seems to be that a note made payable to a married woman is a note to her husband, and becomes instantly his property, and her indorsement thereof transfers no property therein: Savage v. King, 17 Me. 301; Hancock Bank v. Joy, 41 Me. 568, 571.

c. **Labor and Wages.**—In an action against a man for labor performed pursuant to a contract made with his wife, evidence of the contract is rightly excluded where it is not shown that she was authorized to make a contract binding her husband: Gavin v. Bischoff, 80 Iowa, 605, 45 N. W. 306. And an employer has no legal right to pay money due his employé to the latter's wife unless so

instructed; and if he is instructed to do so, he must follow the terms of his authority: Husche v. Sass, 67 Ill. App. 245.

d. **Miscellaneous Transactions.**—A wife has no implied authority to draw her husband's money from a savings bank: Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314. And evidence that a mortgagee's wife told insurance agents to execute renewal policies on the property mortgaged, with mortgage clauses annexed, does not authorize a recovery of premiums from the mortgagee when there is no showing that she was authorized to make such a contract. Colby v. Thompson (Colo. App.), 64 Pac. 1053. A wife intrusted by her husband to transact the ordinary business of a tavern, does not have authority to bind him by a special contract to find provender for stage horses and board for the drivers at less than the usual rates: Webster v. McGinnis, 5 Binn. (Pa.) 235.

A wife has no power to rescind her husband's contracts, without his privity, any more than she has to make them for him: Vaught v. Wellborn, 16 Ala. 377.

e. **Employment of Attorney—Counsel Fees.**

1. **In General.**—The services of an attorney at law in behalf of a wife may be necessaries for which her husband is liable. For example, if he prosecutes her to compel her to find sureties to keep the peace, and fails to sustain the charges made against her, he is answerable for the reasonable fees of attorneys employed by her to defend her against the prosecution: Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515. And, on the other hand, when it becomes necessary for her to exhibit articles of peace against him for her safety and protection, he is liable for the costs of the proceedings, including attorneys' fees: Morris v. Palmer, 39 N. H. 123, citing Shepherd v. McCoul, 3 Camp. 226; Williams v. Fowler, McClel. & Y. 269; Turner v. Rookes, 10 Ad. & E. 47. He is not liable, however, for attorneys' services on her complaint against him for assault and battery, it being the statutory duty of the magistrate to represent her interests: Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532. See, also, Smith v. Davis, 45 N. H. 566. And where a husband is prosecuted by the people for nonsupport of his family, he is not liable for the services of a lawyer rendered on her behalf: McQuhae v. Rey, 23 N. Y. Supp. 16, 3 Misc. Rep. 550. But he is liable for attorneys' services in the successful defense of his wife against his complaint that she is a common drunkard: Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532. And he is also liable for legal services rendered to his wife when she is arrested and prosecuted for murder: Artz v. Robertson, 50 Ill. App. 27.

An attorney may recover of a husband and wife fees for his services and money expended by him in prosecuting in her favor, while she was a feme sole and minor, an action for breach of promise of marriage against her present husband, with whom the suit was

settled by the marriage, if it appears that the services of the attorney were requisite for her personal relief, protection, and support: Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151.

2. In Cases of Separation and Divorce.—There are many authorities to the effect that, in the absence of a controlling statute, the attorney of a wife cannot recover compensation of the husband for his services in suits for divorce from the bonds of matrimony, whether she is plaintiff or defendant, for the reason, it is said, that such proceedings have no relation to her protection as wife: Pearson v. Darrington, 32 Ala. 227; Kincheloe v. Merriman, 54 Ark. 557, 26 Am. St. Rep. 60, 16 S. W. 578; Cook v. Newell, 40 Conn. 596; Dow v. Eyster, 79 Ill. 254; McCullough v. Robinson, 2 Ind. 630; Johnson v. Williams, 3 G. Greene (Iowa), 97, 54 Am. Dec. 491 (Compare Preston v. Johnson, 65 Iowa, 285); Williams v. Monroe, 18 B. Mon. (Ky.) 514; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Dorsey v. Goodenow, 1 Wright (Ohio), 120; Wing v. Hurlburt, 15 Vt. 614, 40 Am. Dec. 695. "The duty of providing necessaries for the wife is strictly marital, and is imposed by the common law in reference only to a state of coveture, and not of divorce. By that law, a valid contract of marriage was and is indissoluble, and therefore, by it, the husband could never have been placed under obligation to provide for the expenses of its dissolution. Such an event was a legal impossibility. Necessaries are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man": Shelton v. Pendleton, 18 Conn. 417, approved in Clarke v. Burke, 65 Wis. 359, 56 Am. Rep. 631, 27 N. W. 22.

While it must be confessed that this narrow view has the sanction of the majority of the American decisions, yet authority for a more liberal and reasonable doctrine is not wanting. It may very well be, and doubtless often is, the case that a proper regard to the rights and protection of wife demands the employment of an attorney in her behalf in divorce proceedings. And this may be true either where she is plaintiff or defendant in the suit. "Where a husband sues his wife for a divorce, charging her with committing acts derogatory to her character, and it is necessary for her, in order to protect her character and good name, to employ counsel to defend her, and she employs such counsel, who performs services for her, giving the credit, however, for his services to the husband, and she has no estate or means to pay for such services, and when she applies to the court in the divorce case for an allowance of alimony pendente lite, including suit money, and before the court renders its decision on such application, her husband dismisses his action for divorce, and thus ends the suit, then may such counsel afterward maintain an action against the husband, before a justice of the peace, for the value of

his services necessarily rendered in such divorce case? We think he may. Of course, where the services are unnecessary, or where the wife is able to pay them, or where an allowance has been made for them, and probably where the wife is in the wrong, such an action could not be maintained. But this is not one of such cases": Justice Valentine in Gossett v. Patten, 23 Kan. 340. So, in Iowa, it is held that a husband is liable for services rendered by an attorney in establishing the innocence of his wife upon a charge of adultery made by the husband himself in an action for a divorce: Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27: Clyde v. Peavy, 74 Iowa, 47, 36 N. W. 883.

In Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637, a nonsuit was granted upon the ground that a man cannot be chargeable for the services of a lawyer in bringing a suit against him without his consent. "This is undoubtedly true as a general principle, but we think that a suit by a wife for a divorce must be excepted from its operation from the necessity of the case. As to this one matter of a suit for a divorce the wife sui juris, having a clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her if she can command no means of paying the agents who are necessary to the conduct of the suit. Therefore it is that, quoad hoc, she may charge the common funds of herself and husband in his hands. But as this power is founded on the necessity of the case, so its extent does not exceed the demands of the necessity; and therefore she can charge the common funds (or her husband, which is the same thing in effect) only with the real value of such services as she may procure, and not with the price she may fix on them by her contract. Upon these views is founded the practice of the courts in granting alimony to the wife during the pending of her suit for a divorce, and in embracing her counsel fees in the allowance. It is worthy of remark that her counsel fees are allowed as a part of her necessary maintenance, and are allowed before it is ascertained whether she has a valid ground for a divorce or not. They are allowed as the necessary means of testing that question which every wife has a right to test whenever she pleases": Per Justice Stephens.

The Texas courts have also recognized that a suit by a wife for a divorce may be necessary for her protection, and that her husband will be liable for reasonable attorneys' fees incurred by her when the suit is bona fide and based upon reasonable grounds. "It is true," remarks Justice Fly, in Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739, "that in a majority of the American authorities it is held that the husband is not liable for attorneys' fees incurred by the wife in connection with divorce proceedings; and, strange to say, the ground usually given for so holding is that, by the common law, the contract of marriage was indissoluble, and and therefore the husband could not be held liable for any expense

incurred in an attempt to dissolve it, while the courts of England, from which the common law is derived, uniformly hold exactly the reverse. . . . . Under the statutes of Texas, the wife is authorized to institute suits for a divorce; and the right would be shorn of all efficacy if she was denied the means of getting into court, as would be the effect in most instances if the husband could not be held liable for the expenses of the suit."

And in a later Texas case, Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811, it is said: "That counsel for the wife in a divorce proceeding can recover, in an independent suit against the husband, a reasonable fee for services in a divorce suit, when the grounds for the divorce were probably true, and there was reasonable cause for bringing the suit, and the suit was brought in good faith, seems now to be the settled law in this state: Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739; Bord v. Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 633; McClelland v. McClelland (Tex. Civ. App.), 37 S. W. 350. These decisions, as do all the American opinions fixing such liability upon the husband, proceed upon the principle that the services rendered by counsel for the wife in instituting and prosecuting a suit against the husband are as for necessaries furnished the wife." It is held in this case, however, that as the suit by the wife for divorce did not appear to have been brought and prosecuted in good faith and upon reasonable grounds, no recovery could be had from the husband for legal services rendered to her. Similar holdings will be found in Sherwin v. Maben, 78 Iowa, 467, 43 N. W. 292; Thompson v. Thompson, 3 Head (Tenn.), 527.

Some authorities make a distinction between suits by a wife for a divorce and suits for separation and maintenance, regarding attorneys' fees incurred by the wife in the latter case, if the suit is necessary to her protection, as a proper charge against her husband, although they would not be in the former case: Williams v. Monroe, 18 B. Mon. (Ky.) 514, 518; Langbein v. Schneider, 27 Abb. N. C. (N. Y.) 228; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Kellogg v. Stoddard, 81 N. Y. Supp. 271, 40 Misc. Rep. 92. No substantial reason, to our mind, exists for making this distinction, but we believe that, whether the suit by a wife is for separation or for an absolute divorce, when the same is necessary for her protection and is brought in good faith and upon reasonable grounds, her necessary and reasonable expenses for legal services are properly chargeable against her husband, if she has no means wherewith to meet them. And we believe, also, that her legal expenses incurred in defending herself in an action brought by her husband for a divorce should, in a proper case, be charged to him.

IV. Authority to Procure Necessaries.

a. **In General.**—The relation of husband and wife is ipso facto a letter of credit to the wife for necessaries suitable and proper to the

sphere in which she moves: Calkins v. Long, 22 Barb. 97. It has already been seen that while a husband and wife are living together, the law presumes that she has authority to purchase necessaries for herself and family, and supply the ordinary household wants, and that contracts made by her in relation to such matters are generally binding upon her husband: See "Presumptions and Burden of Proof," ante; Hughes v. Chadwick, 6 Ala. 651; Nissen v. Bendixsen, 69 Cal. 521, 11 Pac. 29; Phillips v. Sanchez, 35 Fla. 187, 17 South. 363; Strong v. Moul, 22 N. Y. St. Rep. 762, 4 N. Y. Supp. 299. "True, the agency of the wife to purchase necessaries is only presumptive, and may be disproved by the husband by showing that he abundantly supplied the house with all things necessary and suitable, or that he had furnished the wife with ample ready money for the purpose, and requested her not to purchase on credit, or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere; though the mere fact that he privately forbade her to act for him will not relieve him from liability, where it appears that he has recognized her agency, or has in some way allowed her to appear to have charge of his house. The husband, in the view of the law, is the head of the house, and has a right to control the affairs of his own household. Nevertheless, while he has a right to say when and how his house shall be supplied, he cannot repudiate his obligation altogether": Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834. He is bound to provide his wife and family "whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. And, ordinarily, he will be presumed to assent to her making such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision; but he is at liberty to withhold such assent and destroy such presumption by an express prohibition; and if he does so, no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his own duty that supplies become absolutely necessary according to their condition": Keller v. Phillips, 39 N. Y. 351. The fact that the tradesman who supplies the wife has no knowledge of her necessities or of her husband's circumstances, and at the same time supplies her with articles which are not necessaries, does not relieve the husband from responsibility: Eames v. Sweetser, 101 Mass. 78.

This has sometimes been called an "agency in law" or an "agency of necessity," but, accurately speaking, it is not referable to the law of agency, for the husband's liability does not depend upon any authority conferred by him. He may, when he neglects or refuses to furnish necessaries, be liable for those supplied to his wife against his express orders. The real foundation of his liability in such cases is his legal duty to support his wife and supply her with necessaries suitable to her situation and his own circumstances and condition in life: Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77.

b. **De Facto Wife.**—If a man and woman live together as husband and wife, and are so treated and recognized, the reputed husband is liable for family supplies furnished to the reputed wife under the belief that the relation of husband and wife exists: Hoyle v. Warfield, 28 Ill. App. 628; Warrington v. Anable, 84 Ill. App. 593. When a man marries and introduces the woman as his wife, and they present to the outward world the evidence of the relation of husband and wife, he is estopped to deny the relation as against tradesmen who deal with and supply her with necessaries on his account; Johnston v. Allen, 39 How. Pr. 506.

c. **What are Necessaries** is a question which, already at different points in this note, has incidentally engaged our attention. It is certain that the term, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, and probably of ornament, as are suitable to maintain the wife according to the estate and rank of her husband: Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77. The question is one of relative fact, depending upon the standing and circumstances of the parties, and is for the jury to determine, in any particular case, both as to the kind and quality of the goods, services, etc., furnished: Shelton v. Hoadley, 15 Conn. 535; Thorpe v. Shapleigh, 67 Me. 235; Walling v. Hanning, 73 Tex. 580, 11 S. W. 547.

Thus, whether a piano kept and used in a family is a family expense is a question for the jury: Vercler v. Jansen, 96 Ill. App. 328; so, the question of whether a sewing-machine is a necessity is for the jury to determine: Willey v. Beach, 115 Mass. 559. See, too, McQuillen v. Singer Mfg. Co., 99 Pa. St. 586; and the same seems to be true as to a cooking-stove: Berry v. Henderson, 102 N. C. 525, 9 S. E. 455. Lodgings are necessaries when a wife is separated from her husband: Oltman v. Yost, 62 Minn. 261, 64 N. W. 564. Religious instruction is not necessary, so that a husband is liable for the rent of a church pew hired and occupied by his wife without his assent: St. Johns Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17. And a horse purchased by her to use in a business conducted by her on her own account is not a necessary for which he is liable: Palmer v. Coghlin (Tex. Civ. App.), 55 S. W. 1122. A stock of goods for purposes of trade, or materials for building a house, or other articles not required nor appropriate for her comfortable support, are said not to be necessaries: Raynes v. Bennett, 114 Mass. 424, citing Merriam v. Cunningham, 11 Cush. 40, Tupper v. Cadwell, 12 Met. 559, 46 Am. Dec. 704.

Articles of jewelry, such as earrings and finger-rings, can hardly be considered, under ordinary circumstances, as necessaries: Otto v. Mathie, 70 Ill. App. 54; Hyman v. Harding, 162 Ill. 357, 44 N. E. 754; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; McBride v. Adams (App. Div.), 84 N. Y. Supp. 1066. A watch and

chain, as being articles of some utility, stand upon a more favorable footing: Marquardt v. Flaugher, 60 Iowa, 148, 14 N. W. 214. In Raynes v. Bennett, 114 Mass. 424, it is decided that it cannot be ruled as a matter of law that two gold chains, a gold locket, and a gold watch are not necessaries.

A wife has, under proper circumstances, presumed authority to employ a domestic servant without the assent of her husband, and he will be liable for the services rendered: Phillips v. Sanchez, 35 Fla. 187, 17 South. 363; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308. There is like authority and liability in the case of a seamstress to do work in the family: Hardenbrook v. Harrison, 11 Colo. 9, 17 Pac. 72; Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759.

Medical attendance and services rendered a wife during sickness are necessaries for which her husband must pay: Cothran v. Lee, 24 Ala. 380; Kendelberger v. Vandeusen, 1 Wils. (Ind.) 289; Towery v. McGaw, 22 Ky. Law Rep. 155, 56 S. W. 727; Carstens v. Hanselman, 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159; Alexander v. Lydick, 80 Mo. 341; Estate of Shipman, 22 Abb. N. C. 289, 5 N. Y. Supp. 559; Webber v. Spannhake, 3 Redf. Sur. (N. Y.) 258; Brown v. Patton, 3 Humph. (Tenn.) 135. And this rule is not changed by the fact that she has agreed with him not to incur any debt against him in the treatment of her ailments: Reed v. Crissey, 63 Mo. App. 184. But if medical services are rendered a wife after she has, without just cause, left or abandoned her husband, by one chargeable with notice of such abandonment, he cannot recover therefor from the husband: Bevier v. Galloway, 71 Ill. 517; Martman v. Tegart, 12 Kan. 177; Williams v. Prince, 3 Strob. (S. C.) 490. Though where a husband and wife are living apart under an agreement whereby she is to have a certain allowance for her support, he can be held liable for medical services rendered her by one not shown to have knowledge of the separation and agreement: Lawrence v. Brown, 91 Iowa, 342, 59 N. W. 256. The fact that a woman is moved during her illness, without her husband's knowledge or consent, from his home to her father's, does not enable him to escape liability for subsequent visits of a physician which he does not forbid: Potter v. Virgil, 67 Barb. 578.

The services of an attorney as necessaries have already been given consideration in this note under the head of "Employment of Attorney—Counsel Fees," ante.

It is the duty of a husband, upon the death of his wife, to provide for the interment of her body in a suitable manner. If he neglects to discharge this duty, he is liable to one who provides for her burial in a reasonable manner. His obligation in this matter is similar to his obligation to provide his wife necessaries during her life. Therefore, if he is absent from home and cannot, or if he is present and will not, discharge this duty, the law implies a request on his part to do so to those who reasonably perform the duty for him: Gleason

v. Warner, 78 Minn. 405, 81 N. W. 206. And his liability is the same where his wife has been compelled to live apart from him because of his cruelty: Scott v. Carothers, 17 Ind. App. 673, 47 N. E. 389; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670. Says Justice Hoar in the last case cited: "The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessaries on his account: and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and it is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to care for her lifeless remains, as to contracts expressly made by her."

d. **Effect of Wife Being Already Supplied.**—A husband's liability for necessaries provided by other persons for her support, it is said, rests entirely upon the ground of his neglect or default: Supervisors v. Budlong, 51 Barb. 493, 516. "The law has imposed the duty upon the husband of furnishing the wife with articles necessary and suitable to his degree and condition in life. If he disregards this duty, the wife may procure them of whom she pleases, and the husband will be liable. While this is true, the husband has the right to furnish them in the mode and from whom he may choose. And when he has furnished them, other persons can have no such right. Their right to do so can arise only when the husband has failed in the performance of this duty. And when he has discharged this duty he may escape all liability for the wife's contracts, unless it be shown that she has been accustomed to make such contracts, and he has recognized them as binding": Rea v. Durkee, 25 Ill. 503. Accordingly, it is held in the principal case, ante, p. 621, that although goods purchased by a wife on her husband's credit from a person from whom she has been accustomed to trade are of a class ordinarily called necessaries, he may show, in his defense, that she was amply supplied with articles of like character, or that she had been furnished with ready money with which to pay cash therefor. The decision of the New York court seems to have the support of the English cases which it cites and reviews, and also of Clark v. Cox, 32 Mich. 204. But see Sauter v. Scrutchfield, 28 Mo. App. 150. In Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440, it is said that if a husband makes sufficient provision for his wife who is separated from him without her fault, or if he makes provision to an amount she assents to receive, he is not bound to make good her contracts for necessaries: See, also, Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297; Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326.

e. **Of Wife Having Means of Her Own.**—There seems to be some doubt as to whether a husband is responsible for necessaries furnished to his wife on his credit when she has means with which to support herself: See Thorpe v. Shapleigh, 67 N. C. 235; Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408. It has been held that if a wife has adequate means of support, she cannot procure necessaries on the credit of her husband when she is living separate from him for justifiable cause: Liston v. Brown, 26 Ind. 489; Hunt v. Hayes, 64 Vt. 89, 33 Am. St. Rep. 917, 23 Atl. 920; "Separation Through Fault of Husband," post. The soundness of these decisions may well be doubted. The right of a wife to support from her husband and his duty to support her do not depend upon the inadequacy of her means, but upon the marriage relation. Her implied authority to pledge his credit springs from his obligation, as husband, to provide for her, and not from the fact that otherwise she will be destitute. The wife's ability to provide herself with the necessaries of life does not relieve her husband of his duty to maintain and support her while they are living together, nor, in our opinion, does it relieve him from the duty when they are living apart by reason of his misconduct: Ott v. Hentall, 70 N. H. 231, 47 Atl. 80. A husband living with his wife is liable for necessaries furnished her, with or without his knowledge; and if furnished and charged to her alone, she is not liable therefor out of her separate estate, unless she expressly undertakes to become so. Her undertaking is never presumed, but must be shown affirmatively: Moore v. Copley, 165 Pa. St. 244, 44 Am. St. Rep. 664, 30 Atl. 829.

f. **Notifying Tradesmen not to Sell to Wife.**—If a husband performs his duty to his family in the matter of providing for their support and maintenance, and gives notice to tradesmen not to sell to his wife on his account, they cannot hold him responsible for goods which they sell her. The sale of goods to her under such circumstance imposes no duty on the husband to return them or abstain from their use at the peril of becoming liable for their value: Fredd v. Eves, 4 Harr. (Del.) 385; Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515; Segelbaum v. Ensmonger, 117 Pa. St. 248, 2 Am. St. Rep. 662, 10 Atl. 759. The notice is not effective to release the husband from liability, however, unless he furthermore provides his family with their necessary wants. He cannot escape his responsibility merely by notifying or ordering tradesmen or other people not to furnish his wife on credit: Pierpont v. Wilson, 49 Conn. 450; Watkins v. De Armond, 89 Ind. 553; Cromwell v. Benjamin, 41 Barb. 558; Doubney v. Hughes, 60 N. Y. 187; McGrath v. Donnelly, 131 Pa. St. 549, 20 Atl. 382. But it is incumbent upon a party who has been forbidden by a husband to give credit to his wife, in order to render the husband responsible for subsequent supplies, to show affimatively that the articles supplied are necessaries, and that the husband himself has failed in his duty to make an adequate supply of necessaries:

Barr v. Armstrong, 56 Mo. 577; Mott v. Comstock, 8 Wend. 544; Keller v. Phillips, 39 N. Y. 351. In the language of Justice Ross in Woodward v. Barnes, 43 Vt. 330, 335: "Whenever a party who has been forbidden to discharge this duty of the husband, undertakes to do it for him, he does so at his peril, and with the burden of showing, not only that the articles furnished are needed for present use in his family for their reasonable clothing, sustenance, and comfort according to his rank and condition in life, but also that the husband has so far neglected his duty in this respect that unless he, or some other one sustaining like relations to the husband with himself, does furnish them, the wife and children cannot reasonably be supplied with them and must suffer for the want thereof. In other words, the party furnishing them must show affirmatively that the articles are suitable to the husband's circumstances in life and needed for present use, and that the husband has so neglected his duty in this respect that it is necessary for the wife and children to apply to someone standing in like relations to the husband with himself, and for some such one to furnish them in order to supply the wants of the wife and children."

Notice published in a newspaper by a husband that he will not pay debts subsequently contracted by his wife, has been held ineffective as to those without notice of it: Walker v. Laighton, 31 N. H. 111.

g. **Loaning Money to Buy Necessaries.**—There are authorities which seem to regard a husband liable in an action at law for money loaned to his wife for the purpose of buying necessaries and actually so expended: Wells v. Lachemeyer, 2 How. Pr., N. S., 252; Kenny v. Meislahn, 75 N. Y. Supp. 81, 69 App. Div. 572. Compare Schwarting v. Bisland, 24 N. Y. Supp. 700, 4 Misc. Rep. 534. It is held, however, that he is not liable unless the person loaning or advancing the money lays out the money or sees it laid out for the goods: Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Marshall v. Perkins, 20 R. I. 34, 78 Am. St. Rep. 841, 37 Atl. 301. But whatever may be the rule of the common law, equity allows one who has loaned or advanced money to a distressed wife, with which to procure necessaries, to stand in the stead of the person supplying them, and to recover of the husband the amount actually paid by her out of the money loaned: Kenyon v. Farris, 47 Conn. 510, 36 Am. Rep. 86; Reed v. Crissey, 63 Mo. App. 184; Walker v. Simpson, 7 Watts & S. 83, 42 Am. Dec. 216. Contra, Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447, 34 N. E. 692, citing the English cases supporting this proposition.

The reasoning of the court in the above cited Connecticut case, says Van Fleet, V. C., in Leuppie v. Osborn, 52 N. J. Eq. 637, 29 Atl. 433, "Appears to me more convincing than that advanced in any of the prior cases. Stated in substance, it is to the effect that it can make no difference to the husband whether he is held liable for money or for the price of necessaries, so long as no recovery for money can be had, unless it is shown that it has actually been spent for neces-

saries; that whether the wife obtains what she is entitled to by one means or the other, the law will discharge its whole duty to the husband by protecting him from liability for anything beyond necessaries, but it cannot discharge its duty to her unless it compels him to support her. If he has a choice as to the method in which he will extend support, the law will let him exercise it, but if he refuses to make a choice and does not provide for her in any way, then she should have a right to resort to any means which will give her what she needs. Besides, it is not certain that the husband's credit will at all times give his wife what she is entitled to—circumstances may arise when nothing but ready money will enable her to get what he is bound to furnish. This reasoning seems to me to be unanswerable."

The New Jersey court holds, however, that this doctrine rests entirely on the fault of the husband, and does not apply where his dereliction is due to his misfortune, as where he is sick and helpless.

h. **Giving Credit to the Wife.**—If credit for necessaries is given to a wife, and not to her husband, the presumption of a contract obligatory upon him to pay for them is thereby repelled. The liability of a husband for necessaries sold to his wife rests upon the assumption that credit is given to him, and that the purchase is made with his implied assent. This liability does not arise if credit is given and the goods charged to her, and not to him: Gafford v. Dunham, 111 Ala. 551, 20 South. 346; Shelton v. Pendleton, 18 Conn. 417; Black v. Clements, 2 Penne. (Del.) 499, 47 Atl. 617; Connerat v. Goldsmith, 6 Ga. 14; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Menefee v. Chesley, 98 Iowa, 55, 66 N. W. 1038; Smith v. Silliman, 11 How. Pr. 368; Brynes v. Rayner, 84 Hun, 199, 32 N. Y. Supp. 542; Ehrich v. Bucki, 27 N. Y. Supp. 247, 7 Misc. Rep. 118; Martin v. Oakes, 85 N. Y. Supp. 387; Carter v. Howard, 39 Vt. 106. But see Furlong v. Hyson, 35 Me. 332; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764, 21 Atl. 834. In the Vermont case just cited the liability sought to be enforced was for medical services rendered to a married woman. Whether credit was given to the husband or the wife is a question for the jury: Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421. See, also, Arnold v. Allen, 9 Daly, 198.

i. Separation of the Spouses.

1. **Effect of, in General.**—A husband and wife may be separated and living apart from each other under such circumstances as to give her implied authority to bind him for her necessaries: McClary v. Warner, 69 Ill. App. 223; Mayhew v. Thayer, 8 Gray, 172; Rumney v. Keyes, 7 N. H. 571, Lockwood v. Thomas, 12 Johns. 248; Button v. Weaver, 84 N. Y. Supp. 388; Frost v. Willis, 13 Vt. 202. And when such is the case, he is not liable merely for the difference between the amount which she earns and the value of the necessaries; he must support her himself, or pay those who do so in a reasonable manner: Cunningham v. Irwin, 7 Serg. & R. 247, 10 Am. Dec. 453.

Ordinarily, however, he is not responsible for her support, in the absence of an express agreement, unless she lives apart from him by his consent, of his conduct is such as to justify her in leaving him: Schmuckle v. Bierman, 89 Ill. 454; Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. 881. See, too, Benjamin v. Dockham, 132 Mass. 181; Olson Co. v. Youngquist, 72 Minn. 432, 75 N. W. 727; Constable v. Rosener, 82 App. Div. 155, 81 N. Y. Supp. 376. The presumption of authority on the part of a wife to bind her husband for necessaries ceases when they are living apart permanently: See the discussion of this point under "Presumptions and Burden of Proof," ante. Prima facie, their living apart is neither in consequence of his improper conduct nor by his assent; therefore, it lies on the person who gives her credit to show the circumstances under which they separated: Schindel v. Schindel, 12 Md. 108; Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669.

2. **Separation by Agreement.**—If a husband and wife separate and live apart by consent or agreement, she not having means of support, and no proper provision being made therefor by him, she carries his credit with her for necessaries for herself: Note to Cunningham v. Irwin, 10 Am. Dec. 465; Burkett v. Trowbridge, 61 Me. 251; Carley v. Green, 12 Allen, 104; Cunningham v. Irwin, 7 Serg. & R. 247, 10 Am. Dec. 458; and also for their children which he permits to remain with her: McMillen v. Lee, 78 Ill. 443. He is not liable for her necessaries, however, if he agrees to make a suitable allowance for her support, and complies with such agreement: Kemp v. Downham, 5 Harr. (Del.) 417, Brown v. Brown, 5 Gill (Md.), 249; Cany v. Patton, 2 Ashm. (Pa.) 140. It would seem reasonable that the husband could not escape his responsibility in case the provision he makes for his wife's support is inadequate to that purpose: See Pearson v. Darrington, 32 Ala. 227; McKinney v. Guhman, 38 Mo. App. 344. Nevertheless, it has been held that if a husband and wife live apart by consent, she receiving a sum not sufficient for her support, and agreeing to release her dower, to support herself, and to make no claim upon him, and not having subsequently made any claim upon him or offered to return, he is not liable for necessaries furnished her: Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297, citing Biffin v. Bignell, 7 Hurl. & N. 877; Eastland v. Burchell, 3 Q. B. Div. 432.

Where a husband contracts with a third person to maintain his wife, she does not carry with her, upon leaving such person without just cause, authority to pledge her husband's credit for her support: Pidgin v. Cram, 8 N. H. 350.

3. **Separation Through Fault of Husband.**—If a husband wrongfully abandons or deserts his wife, or if he compels her by his cruelty or misconduct to leave his home, she carries with her an implied authority to charge him for necessaries for herself and children. Being bound to support his wife and family, he cannot escape this obligation by his own wrongful act; and if, by his improper conduct,

he drives her to seek support from others, or justifies her in so doing, the law, still holding him to his duty under the new state of affairs which he brings about, implies an authority from him to her to procure necessary supplies on his credit from whom or whence she chooses: Biddle v. Frazier, 3 Houst. (Del.) 258; Ross v. Ross, 64 Ill. 569; Hoobler v. Heenan, 81 Ill. App. 422; Peck v. Gibeson, 83 Ill. App. 92; Brinckerhoff v. Briggs, 92 Ill. App. 537; Bonney v. Perham, 102 Ill. App. 634; Rariden v. Mason, 30 Ind. App. 425, 65 N. E. 554; Tibbetts v. Wadden, 94 Iowa, 173, 62 N. W. 693; Billing v. Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523; Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422; East v. King, 77 Miss. 738, 27 South. 603; Allen v. Aldrich, 29 N. H. 63; Hardy v. Eagle, 51 N. Y. Supp. 501, 23 Misc. Rep. 441; Hultz v. Gibbs, 66 Pa. St. 360. Some authorities restrict this doctrine to those cases where the wife has no adequate means for her own support: Arnold v. Brandt, 16 Ind. App. 169, 44 N. E. 936; Prescott v. Webster, 175 Mass. 316, 56 N. E. 577. We have already expressed an opinion upon the soundness of this restriction. See, "Of Wife Having Means of her Own," ante.

As to the right of a deserted wife to dispose of her husband's property for the purpose of obtaining necessaries, see the note to Buford v. Adair, 64 Am. St. Rep. 862, 863.

4. **Through Fault of Wife.**—If a husband provides his wife a suitable home, and supplies her with necessaries and comforts commensurate with her station in life, but, contrary to his wishes and without sufficient cause, she leaves or refuses to live with him, he is not responsible to one who furnishes her with necessaries: Collins v. Mitchell, 5 Harr. (Del.) 369; Spitler v. Spitler, 108 Ill. 120; Oinson v. Heritage, 45 Ind. 73, 15 Am. Rep. 258; Peakes v. Mayhew, 94 Me. 571, 48 Atl. 172; Sawyer v. Richards, 65 N. H. 185, 23 Atl. 150; Board of Supervisors v. Budlong, 51 Barb. 493; Brown v. Patton, 3 Humph. 135; Cline v. Hackbarth, 27 Tex. Civ. App. 391, 65 S. W. 1086; Brown v. Mudgett, 40 Vt. 68; Thorne v. Kathan, 51 Vt. 520. But it is for all persons having knowledge of the separation to know whether the wife had good cause for deserting her husband: Rea v. Durkee, 25 Ill. 503. Tradesmen dealing with a woman living apart from her husband must ascertain at their peril whether circumstances exist which will warrant them in supplying her on credit: Billing v. Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523; Porter v. Babb, 25 Mo. 36. The fact that a woman procures a divorce on the ground of cruelty has been held not to conclude the husband from denying the cruelty, on an issue respecting her justification in leaving him, raised in a suit brought against him by a third person for necessaries furnished her after leaving her husband and before obtaining the divorce: Corry v. Lackey, 105 Mich. 363, 63 N. W. 418. A parent of a woman who, without just cause, leaves her husband, cannot hold him responsible for her board or necessaries: Catlin v. Martin, 69 N. Y. 393.

5. **Adultery and Elopement.**—The adultery of a wife living apart from her husband has been said to revoke her implied authority to bind him for necessaries: Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73. So it has been held that a wife who has been turned away by her husband because of her adultery, does not carry with her credit upon him: Hunter v. Boucher, 3 Pick. 289. But a man's duty to support his wife is not terminated by her adultery when committed with his consent upon condition that she will not look to him for support: Ferren v. Moore, 59 N. H. 106. Where a wife elopes from her husband, though not with an adulterer, the husband cannot be held liable for necessaries supplied her: McCutchen v. McGahay, 11 Johns. 281, 6 Am. Dec. 373.

6. **Notice of the Separation.**—If a married woman has traded with or made purchases of a tradesman, with the acquiescence or authority of her husband, her agency to charge him for further purchases is not revoked by a separation of the spouses without notice thereof to the tradesman: Anonymous, 48 N. Y. Supp. 277, 21 Misc. Rep. 656; Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964; Anthony Cowell & Co. v. Phillips, 17 R. I. 188, 20 Atl. 933. If a wife elopes, it has been held that her husband is not liable for necessaries furnished her by tradesmen, though they have no notice of the elopement: McCutchen v. McGahay, 11 Johns. 281, 6 Am. Dec. 373; Sturtevant v. Starin, 19 Wis. 268. A contrary view is taken in Vanuxen v. Rose, 7 Ind. 222. In case, however, notice of a separation is thought necessary, the general reputation of the separation is sufficient to protect the husband: Calkins v. Long, 22 Barb. 97, 100; Le Boutillier v. Fiske, 47 Hun, 323. But notice is not imparted by the fact that the separation is generally known in the city where the husband lives, if the seller resides in another city: Sibley v. Gilmer, 124 N. C. 631, 32 S. E. 964. A physician who is called by a woman to attend her child is not chargeable with constructive notice that the father and mother are not living together, and the father is responsible for the medical services rendered: Dixon v. Chapman, 67 N. Y. Supp. 540, 56 App. Div. 542.

7. **Resumption of Cohabitation.**—If a husband who has deserted his wife seeks a reconciliation, but she, without good cause, refuses to live with him again, she no longer has implied authority to pledge his credit for necessaries: Walker v. Laighton, 31 N. H. 111. On the other hand, if a wife who has abandoned her husband returns or offers to return to him, his liability for her necessaries is thereby revived: Henderson v. Stringer, 2 Dana (Ky.), 291; McCutchen v. McGahay, 11 Johns. 281, 6 Am. Dec. 373; McGahay v. Williams, 12 Johns. 293; but he does not become responsible for necessaries furnished during her absence and before she returns or offers to return: Reese v. Chilton, 26 Mo. 598; Williams v. Prince, 3 Strob. (S. C.) 490.

j. **Pendency of Suit for Divorce.**—It seems that a husband's liability for necessaries furnished his wife is not affected by the fact that he has commenced an action for a divorce, unless alimony has been allowed: Johnstone v. Allen, 39 How. Pr. 506. But where a wife is living separate and apart from her husband, and, in a suit against him for a divorce, has obtained a decree fixing the amount of alimony to be paid for her sustenance during the pendency of her petition, and he is not in default in respect to the payment thereof, he is not liable for necessaries subsequently furnished while the suit is pending: Hare v. Gibson, 32 Ohio, 33, 30 Am. Rep. 568.

WILCOX v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

[176 N. Y. 115, 68 N. E. 153.]

FRAUD—Negligence as a Bar to Relief from.—The Negligence of a Party in Failing to Read a Paper which he has signed does not preclude him from attacking its validity. (p. 651.)

EJECTMENT—Avoiding Deed for Fraud in Actions of.—In an action of ejectment in which a deed executed by the plaintiff is received in evidence against him, he may avoid its effect by showing that it was procured by fraud, as by representing to him that it was a receipt, and thus obtaining his signature to it. (p. 652.)

DEEDS—Return of Consideration, When not Necessary Before Attacking for Fraud.—Where a party is procured to sign a conveyance on the representation that it is a receipt for the sum of one dollar for money due him, it is not necessary for him, before attacking it, to offer to return the dollar. (p. 652.)

Action of ejectment. Judgment in favor of the defendant entered by the trial court was affirmed on appeal to the appellate division of the fourth judicial department.

Jay K. Smith, for the appellant.

Elbridge L. Adams and Melville Egleston, for the respondent.

116 CULLEN, J. The action was brought in ejectment to recover lands in the highway occupied by the defendant's poles, and for damages. On the trial the plaintiff proved title to the locus in quo and the entry thereon by the defendant and the erection of its poles. The defendant then put in evidence an instrument under seal executed by the plaintiff some years after the original entry on the highway, whereby the plaintiff in con-

sideration of one dollar granted to the defendant the right to construct, operate and maintain its lines over and along the plaintiff's property. The plaintiff admitted his signature to this instrument, but testified that at the time of its execution he was told by an agent of the defendant that he had trimmed one of the plaintiff's trees and wished [117] to pay him a dollar for it; that the agent told him the paper was a receipt for a dollar; that he, the plaintiff, did not read the paper, that he had not his spectacles with him, and that thereupon relying upon the statement of the agent as to its contents he signed the paper. On this evidence the court directed a nonsuit and the judgment entered thereon was affirmed by the appellate division by a divided court, Mr. Justice Spring writing for reversal.

The ground on which the learned trial judge disposed of the case, as appears in the opinion rendered by him upon denying the motion for new trial, was that the negligence of the plaintiff in failing to read the paper which he signed precluded him from attacking its validity. We think no such rule of law prevails in this state, though there may be dicta in the text-books and decisions in other jurisdictions to that effect. It was expressly repudiated by this court in Albany City Sav. Inst. v. Burdick, 87 N. Y. 40, where Judge Earl said: "It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence, his own negligence contributing to the injury will constitute a defense to the action; but where one sues another for a positive, willful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief": See, also, Welles v. Yates, 44 N. Y. 525; Smith v. Smith, 134 N. Y. 62, 30 Am. St. Rep. 617, 31 N. E. 258. It is true that in the opinion delivered in the Smith case Judge Landon refers to the relations of confidence between the parties, but only as affecting the credibility of the plaintiff's story that she executed the instrument relying on the defendant's statements as to its contents. The decision did not proceed on any ground of trust relations between the parties. On the contrary, the learned judge said: "The learned counsel for the defendant cites numerous cases, mostly from other states, to support his contention that plaintiff's negligence in not reading the deed defeats their appeal to equity to relieve [118] them from it. The law of

this state as stated in Albany City Sav. Inst. v. Burdick, 87 N. Y. 40, is not so harsh as in some of the cases cited. It does not, in cases like this, impute inexcusable negligence to that omission of vigilance and care procured by the fraud of the wrongdoer." In the other cases cited there was no relation of trust between the parties, but merely that of vendor and purchaser. In a case where a third party has parted with value on the faith of the instrument executed by a person, the question of negligence leading to the execution of the instrument might be material (see opinion of Gray, J., in Marden v. Dorthy, 160 N. Y. 60, 54 N. E. 726), but it can have no relevancy in favor of the party who it is alleged committed the fraud. The credibility of the plaintiff's statement was for the jury; if the trial judge deemed it unreliable he might have set aside a verdict based upon it, but that did not authorize him to withdraw the case from the jury or to direct a verdict or a nonsuit: McDonald v. Metropolitan Street Ry. Co., 167 N. Y. 66, 60 N. E. 282.

The practice adopted by the plaintiff was entirely proper. He was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained: Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182, 31 N. E. 1104. Nor was he obliged to return the dollar paid to him on its execution. The plaintiff does not attempt to rescind a contract as induced by fraud; the charge by him relates, not to the contract, but to the instrument which purports to represent the contract. In such a case the return of the consideration is unnecessary: Cleary v. Municipal Electric Light Co., 19 N. Y. Supp. 951, 65 Hun, 621; affirmed on opinion below, 139 N. Y. 643, 35 N. E. 206.

The judgment should be reversed and a new trial granted, costs to abide the event.

O'Brien, Bartlett and Werner, JJ., concur.

Parker, C. J., not sitting.

Gray, J., not voting.

Haight, J., dissents.

One cannot Release Himself from the obligation of contract, in the absence of fraud, on the ground that he did not read it before signing, if he had full opportunity to read it and signed it delib-

erately: Crim v. Crim, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489. It is otherwise, however, when his signature is procured by false representations, he being ignorant of the true character of the instrument, and having no intention to sign such a paper, and not being guilty of negligence: Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364; Willard v. Nelson, 35 Neb. 651, 37 Am. St. Rep. 455, 53 N. W. 572.

COHNFELD v. TANENBAUM.

[176 N. Y. 126, 68 N. E. 141.]

A CHECK Drawn by I. C., Guardian, Puts the Payee on Inquiry to ascertain the authority of the guardian to apply the money to the payment of a debt not due from the ward. (p. 654.)

BANKING—Account in Name of Guardian—Presumption as to Ownership of Moneys.—Where an account is opened in the name of I. C., guardian, in which moneys belonging to the ward are intermingled with moneys of a corporation of which the guardian was the manager, any balance remaining on deposit after the drawing of various checks will be presumed to be the money of the ward. (pp. 655, 656.)

George W. Weiffenbach, for the appellant.

Sol. M. Strook, for the respondent.

120 CULLEN, J. The action was brought by the plaintiff in his own right and as assignee of his brothers and sisters, children and wards of Isidore Cohnfeld, deceased, to recover from the defendant the amount paid to him by said guardian by three checks, aggregating the sum of twelve hundred dollars. The case was tried on an agreed statement of facts which is extremely meager in its details. By such statement it appears that said Isidore was appointed guardian of said children on January 2, 1885. On January 1, 1886, he had in his possession moneys of his wards amounting to ten thousand three hundred and fifty-five dollars and seventy-nine cents, and in March, 1892, he opened an account in the New York Security and Trust Company in the name of Isidore Cohnfeld, guardian, and deposited therein the sum of twelve thousand dollars. At the same time he filed with the trust company a certificate of his appointment as guardian by the surrogate of New York county. Various deposits were made to the credit of that account and checks drawn against it. No information is given as to the sources from which the moneys deposited were obtained or the

purposes to which the checks drawn on the account were appropriated, except that there were from time to time some moneys of the Cohnfeld Manufacturing and Trading Company, a corporation of which the guardian was manager, deposited in the account. What those sums were or what checks were drawn against them is not stated. From the bank account it appears that on the first day of January, 1893, all the moneys had been withdrawn except a balance of sixty-one dollars. In August, September and December of that year the guardian drew three checks, the subject of this action, and delivered them to the defendant in payment of claims for rent he held against the Cohnfeld Company. The guardian died in April, 1896, without having accounted [130] to the wards for their property. The defendant had no knowledge of the rights of the parties to the moneys paid to him except such as was given to him by the form of the checks, which were signed Isidore Cohnfeld, guardian. On these facts the trial court rendered judgment for the defendant, which has been affirmed by the appellate division.

We think the courts below erred in their disposition of this case. From the extremely meager character of the evidence it will be seen on final analysis that the determination of the case must be governed by presumptions. The signature to the check, "Isidore Cohnfeld, Guardian," gave the defendant notice that presumptively the funds being paid to him were not those either of the Cohnfeld Manufacturing Company or of Isidore Cohnfeld personally, and he was put on inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debt: Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115. This proposition is conceded by both the courts below. Had he made the inquiry he would have learned the facts which have already been stated. He is, therefore, chargeable with all that those facts import or which is fairly to be inferred from them. It is to be noted that the parties did not admit nor did the court find that at the time at which the checks in suit were drawn there was a dollar of the moneys of the Cohnfeld Company remaining in the account, nor are there any facts admitted or found from which such an inference can be drawn. The finding is that moneys of the company were deposited in the account and payments made from the account on its behalf, but not a word as to the amount of the deposits or the amount of the payments. It is very evident that the first question to be determined is, to whom, on this state of facts, did the moneys

of the account prima facie belong, and this question is to be decided between the plaintiff and the defendant the same as it would be between the plaintiff and the company, were that company asserting its rights to the moneys on deposit. No evidence was given by the plaintiff to show that any of the moneys of the wards were deposited in the account subsequent [131] to its depletion in January, 1893, and for this reason the courts below were of opinion that the plaintiff had failed to identify the moneys paid to the defendant. But it was not necessary for the plaintiff to give evidence on the subject. The account was that of the wards or of their property. There is neither finding nor proof that the guardian embezzled the money withdrawn by him prior to January, 1893. The money may have been drawn out for investment or other legitimate purposes, and when moneys were subsequently received by the guardian from such investments it was his duty to again deposit them. But if we assume that the guardian had embezzled the money, the obligation existed to make restitution and his subsequent deposits from whatever sources received would be an appropriation of those moneys in satisfaction of his wards' claim against him. From such time they became the infants' moneys as against everyone except one who claiming the moneys could show they had been wrongfully diverted: Baker v. New York National Exchange Bank, 100 N. Y. 31, 53 Am. St. Rep. 150, 2 N. E. 452. In the opinion of the learned appellate division it is said: "It is immaterial that in this case the account was opened and continued in Cohnfeld's name as guardian. We have a mixed fund to deal with in which moneys of different parties were mingled by one occupying a fiduciary relation to both parties and the rights of these parties are to be settled upon equitable principles." We entertain a different view. We think the point on which this case turns is the name and character in which the account was opened and kept. In the absence of proof to the contrary all the moneys in that account were presumptively the property of the wards. For another party to successfully reach any part of the fund it would be insufficient to show merely that moneys of the party had been improperly placed in the account; it would be necessary to go further and to prove the amount so deposited; in other words, the burden of proof would rest on the claimant to establish just what portion of the fund belonged to him and the remainder, as to which he failed to affirmatively show title, would be awarded to the party in [132] whose name the account stood and to whom it presumptively belonged. As

already said, there is no proof in the case that any particular sum on deposit was the property of the Cohnfeld Company.

These views dispose of the objection that the plaintiff failed to comply with the rule that to follow trust funds they must be identified. The funds in this case were identified by their deposit in the trust company to the credit of Cohnfeld, guardian. Nor do we see that the rule adopted in Clayton's case (Devoynes v. Noble, 1 Mer. 572) has any application to this case. That rule, that the earliest draft should be charged against the earliest deposits, might apply if it appeared that the moneys on deposit were insufficient to satisfy the claims of both cestuis que trustent, the wards and the Cohenfeld Company; but it has no bearing on the proposition that the burden rested on the Cohnfeld Company or on the defendant, who claims under it, to establish that it had any claim on the trust fund.

The judgment should be reversed and a new trial granted, costs to abide the event.

Parker, C. J., Bartlett, Haight, Martin, Vann and Werner, JJ., concur.

Making Deposits or opening accounts with a bank by a person as "agent" or "trustee" is discussed in Baker v. New York Nat. Bank, 100 N. Y. 31, 53 Am. Rep. 150; Duckett v. National Mechanics' Bank, 86 Md. 400, 63 Am. St. Rep. 513, 38 Atl. 983. The letters "Guar." following a guardian's name in a certificate of deposit do not, it is held, show that the deposit was made as guardian: See the monographic note to Schmidt v. Shaver, 89 Am. St. Rep. 298.

RUSSELL v. PRUDENTIAL INSURANCE COMPANY.

[176 N. Y. 178, 68 N. E. 252.]

INSURANCE—Presumption as to the Reading of the Application.—In the absence of fraud, the legal presumption is that the insured read, or had read to him, the application before signing it. (p. 664.)

INSURANCE—Application, When Binding on the Insured.—The insured is charged with notice of the contents of a written application which he executed and which, by the terms of the policy, is made a part thereof; and if the application provides that the policy shall not be in force until the first premium is paid, the legal result is that the insured covenants with the corporation directly, and not through its agents, that the policy shall not be binding until such payment is made. (p. 664.)

INSURANCE, LIFE—Agent, Authority of May be Limited.—An insurance corporation may enter into a contract with a person applying for insurance which so fixes the precise conditions under which the policy shall issue that an agent, in the absence of express authority, cannot abrogate it. (p. 664.)

INSURANCE, LIFE—General and Local Agents—Restrictions on the Power of.—An insurance corporation may so draw the various papers connected with its contract of insurance as to prevent general and local agents from exercising powers to the detriment of the corporation, when the substantial provisions of that contract are brought home to the insured prior to the alleged delivery of the policy. (p. 665.)

INSURANCE, LIFE—Provisions Requiring Payment of Premium Before Policy Takes Effect, Agent, When may Waive.—When an application for life insurance, signed by the applicant, provides that the policy shall not take effect until the first premium is paid in full, and the policy, as issued, declares that no agent has power to extend the time for paying the premium or to waive any forfeitures, and that these powers can be exercised only by the president or secretary or one of the vice-presidents and will not be delegated, and that no provision in the policy can be waived or modified except by such officers by indorsement on the policy, a general agent whose appointment specifies that he has no authority to make, alter or destroy any contract, to waive any forfeiture or to receive any moneys except on policies or renewals signed by the president, secretary or manager of the ordinary branch, has no power to waive the payment of the first premium, and the delivery of a policy by him without such payment, is ineffective. (p. 665.)

Action on a policy of life insurance. Judgment in favor of the plaintiff was affirmed on appeal to the appellate division of the fourth department of the supreme court.

D. Raymond Cobb, for the appellant.

Frederick A. Kuntzsch, for the respondent.

180 BARTLETT, J. The defendant is an insurance corporation organized in New Jersey, conducting two classes of insurance, one known as the "industrial" and the other "ordinary" insurance. Under the former plan small policies are issued upon which weekly payments are paid; under the latter larger policies are issued, the premiums being payable annually, semi-annually or quarterly.

The plaintiff sued to recover on a policy issued on the life of her deceased husband under the "ordinary" plan. The defendant was represented in this state by one Charles H. 181 Tennant as general agent at Syracuse. Tennant's district consisted of the counties of Onondaga, Oswego and Cortland.

It appears that at the time negotiations were opened for the policy sued on, the insured held a policy for a like amount in the defendant company, which was duly paid.

The complaint alleges that on the thirtieth day of December, 1899, the defendant issued the policy in suit; that on the sixth day of January, 1900, the defendant waived the payment of the first premium and extended same for a period of thirty days; that on the tenth day of January, four days thereafter, the insured was killed by an explosion.

The answer is a general denial, and also contained an affirmative defense to the effect that defendant had not insured the plaintiff's life, and that the policy alleged in the complaint never had an inception, the plaintiff not having paid the annual premium thereon, or complied with the preliminaries necessary to give it validity. The issues were tried at the Onondaga trial term and the jury rendered a verdict in favor of the plaintiff. The appellate division affirmed the judgment entered upon the verdict. No prevailing opinion was handed down, but Justice Hiscock wrote a dissenting opinion, Justice Williams concurring.

The facts are as follows: On the twenty-sixth day of December, 1899, the plaintiff made a written application for the policy in suit. The material portions of that application read: "I hereby declare and warrant that all the statements and answers to the above questions, as well as those made or to be made to the company's medical examiner, are or shall be complete and true, and that they, together with this declaration, shall form the basis and become a part of the contract of insurance hereby applied for. And it is further agreed that the policy herein applied for shall be accepted subject to the conditions and agreements therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company and the first premium paid thereon in full," etc. This application was signed by the applicant and duly witnessed.

182 Upon receipt of the application the policy was sent to the general agent at Syracuse. On January 6, 1900, the general agent, in company with a subagent, went to the house of the deceased and had an interview with him.

Plaintiff swears in substance that after her husband had stated his inability to pay the first premium at that time, the general agent informed him that he might have thirty days additional time in which to pay the first premium and that the insurance would go into immediate effect. The general agent and the subagent denied this conversation in toto and say that deceased was distinctly informed that the policy, as

stated therein, would not go into effect until the first premium was paid in full. The receipt for the first premium was thereupon signed by the general agent and delivered to the insured and by him handed to the subagent, who was to hold it until the payment was actually made. This transaction as to the receipt is not disputed.

The policy contained the following, among other, provisions—it is headed, "Regarding agents": "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend time for paying the premium, to waive any forfeiture, or to bind the company by making any terms, or making or receiving any representation or information. These powers can be exercised only by the president, one of the vice-presidents or the secretary, and will not be delegated. Modifications, etc. No provision of this policy can be modified or waived in any case except by indorsement hereon signed by the president, one of the vice-presidents or the secretary."

The general agent was appointed to his position under a written contract, which is in evidence, and contains this provision, among others: "4. It is understood and agreed that said general agent has no authority on behalf of the Prudential Insurance Company of America, to make, alter or destroy any contract, to waive forfeitures, nor to receive any moneys due or to become due to said company, except on policies or renewal receipts signed by the president, secretary 188 or manager of the ordinary branch and sent to him for collection."

These facts constituted, substantially, the plaintiff's case, and the defendant thereupon moved for a nonsuit, on the ground that the plaintiff had failed to make out a cause of action. The court denied the motion. The defendant swore the general agent and subagent as witnesses, and each positively denied that the conversation testified to by plaintiff ever occurred between the general agent and the insured.

At the close of the evidence the defendant again moved for a nonsuit and for a directed verdict, specifying, among others, the ground that upon the plaintiff's own evidence, and upon the uncontradicted evidence in the case, the general agent had no authority to make or modify the contract of insurance as testified by plaintiff.

The learned trial judge, in denying this motion, said: "I deny the motion and give you an exception. The one ques-

tion I am going to submit to the jury is this: whether on January 6, 1900, Mr. Tennant, at the time he delivered the policy to Mr. Russell, agreed that the time for payment of the premium should be extended, as is claimed by plaintiff, and that the policy could, in the meantime, remain in force. That is the only question I am going to submit to the jury. If they find in favor of the plaintiff upon that state of facts the verdict will be for plaintiff. If they find for defendant upon that proposition the verdict will be for the defendant." To this limitation the defendant excepted.

The trial judge, in one of his rulings, said: "I hold as matter of law that if Mr. Tennant did what plaintiff claims he did on the 6th of January, then there can be a recovery in this case." To this ruling the defendant excepted.

The defendant contended that if there was any evidence that Tennant had apparent authority to put the policy in force and waive its express conditions, and any evidence of estoppel, the questions were for the jury, but the court adhered to its view that it was a question of law upon the contract of insurance.

[184] The important question presented in this case, therefore, is, Can an insurance company so draw the various papers constituting its contract of insurance as to prevent general and local agents from exercising powers to the detriment of the company, when the substantial provisions of that contract are brought home to the insured prior to the alleged delivery of the policy.

This case may be regarded as a test one on the point, as it is apparent that the contract of insurance now before the court is as strong in favor of the company as language can make it.

In considering the law of this case, we are met at the outset by the contention of the respondent that the case of Stewart v. Union Mut. Life Ins. Co., 155 N. Y. 257, 49 N. E. 876, is controlling. In that case it was held that the right of insurance companies to restrict their liabilities for acts of their agents, by inserting clauses in the application and policy restricting the powers of agents, must be recognized, unless by so doing their contracts would become tainted with fraud, and in such case it will be presumed that the waiver was intended rather than fraud. In that case it was distinctly held that to have decided it in favor of the company would have

worked a fraud upon the insured under the undisputed facts. The defendant in the case cited was a Maine corporation.

It is true that the application and policy were quite similar to the case at bar. The application provided that "it will constitute no contract of insurance until a policy shall have first been issued and delivered by the company and the first premium thereon paid during the life of the party proposed for insurance in the same condition of health as described in the application."

The policy provided that: "All premiums are due at the office of the company in the city of Portland, Maine, at the date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt thereof, signed by the president, secretary or assistant [185] secretary. Any payments made to any person except in exchange for such receipt will not be recognized by the company, or be deemed by either party as a valid payment. No agent, nor any other person, except the president, or secretary, in writing has power to alter or change in any way the terms of this contract, or to waive forfeiture."

One Crane was the manager of the defendant's business in the state of New York. The precise powers of the manager do not appear, and we are, therefore, not advised whether he was clothed with more ample authority than the general agent in the case at bar. The policy was issued on the nineteenth day of April, 1890, on the life of the plaintiff's husband. The manager delivered the policy to the insured, taking a note for one hundred and twenty-three dollars and ten cents, being the amount of the first year's premium, which note became due and payable on May 31, 1890. On August 9, 1890, a check for the amount of this note, which had been given by the insured to the manager in response to a letter from the cashier of the company, dated four or five days before the note fell due, calling the insured's attention to the due date, was deposited for collection, but returned by the bank marked, "not good." The insured was notified of the nonpayment of this check August 9th; on August 12th the insured notified the manager he was ill, but would arrange for the payment of the check the last of that week. The insured died two days later.

We thus have the manager for the state of New York taking a note for the first year's premium, which was not paid at maturity, and accepting a check for the amount of the

note, which was not paid on presentation two or three months after it was given.

It is thus rendered clear by inevitable inference that the home office in Maine must have been advised of this departure from the strict rule in regard to the payment of premium at the time the policy was issued and had ratified the action of its manager. It cannot be fairly assumed that a policy taking effect the latter part of April had not been reported to the home office by the following August.

186 This view was evidently entertained by the court, as appears in Judge Haight's opinion, at the bottom of page 266, 155 N. Y. and page 878, 49 N. E., as follows: "There is still another theory upon which, we think, the plaintiff established a cause of action, at least sufficient to make it a question of fact for the jury. It is apparent that Crane represented to Stewart that he had an insurance and that Stewart supposed himself to be insured from the letters, expressions and acts to which we have referred. It is also apparent that the contract was that Stewart was to have credit. This may be clearly inferred from Crane's first letter. The rule is, that the knowledge of the agent is the knowledge of the principal, and it will be presumed that the company knew the terms of the contract entered into by its agent, and either waived the provisions of the policy for immediate payment of the premium, or held itself estopped from setting it up, for to hold otherwise would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument."

In the case at bar we have no such situation. The policy was delivered on the sixth day of January, and the insured was accidentally killed four days thereafter, so that there can be no presumption of ratification of the act of the general agent in delivering the policy without collecting the premium as required by the rules of the company. It follows that the case cited is distinguishable from the one at bar and offers no obstacle to our disposing of the latter on its peculiar facts.

In the case before us we have a contract that distinguishes it from a large number of cases which hold that the provision of the policy to the effect that only certain officers of the company can waive payment of premiums when due and that agents cannot do so, does not apply to the initial premium. This distinguishing feature is found in the fact that the application, which is made a part of the policy, contains the express condition that the policy shall not take effect until the same

shall have been issued and delivered by the company and the first premium paid thereon in full.

In this connection it is to be observed that not only is the 187 application made a part of the policy by its terms, but the policy opens with this provision: "In consideration of the application for this policy, which is hereby made part of this contract, and of the quarterly annual premium of seven and two one-hundredths dollars, which it is agreed shall be paid to the company in exchange for its receipt on the delivery of this policy," etc.

The above quotation from the policy gives added significance to the manner in which the receipt was treated at the interview between the agents and the insured, to which reference has already been made. The policy states that it is to be given in exchange for the receipt, and it rests upon the undisputed evidence that the receipt was left in the custody of the subagent, not to be surrendered until the first premium was paid.

In many of the cases cited, where insurance companies were held liable, the agent having waived the payment of the first premium contrary to the provisions of the policy and without authority from the company, the decision was based upon the fact that the policy had never been delivered to the insured, and, consequently, he could not be charged with notice of its contents at the time of the agent's waiver of payment.

It was argued that to hold otherwise would practically permit the company, through its agent, to work a fraud upon the insured by leading him to believe that he had secured insurance when such was not the fact.

We have been cited to a multitude of cases by the respondent which it is quite impossible to review in detail within the limits of an ordinary opinion. Many of these are within the class to which reference has already been made, in regard to waiving the payment of the initial premium, and others deal with waiver in various forms, such as resting on the general course of business with the insured; knowledge of the agent before issuing the policy that property was subject to mortgage or other lien; that the title was in a third person; that there was other and undisclosed insurance, or various 188 conditions which would render the policy void, by its terms, if the company were not chargeable with the knowledge of its agent, by reason of information imparted to him by the insured during the preliminary negotiations.

In the case at bar there is no evidence of a course of business between the company and the insured, nor was it shown that the general agent had power to waive payment of the first premium. On the contrary, the plaintiff put in evidence the contract between the company and its general agent, which showed, affirmatively, that he possessed no such power.

We thus come to the important and controlling question in this case, whether the insured is to be charged with notice of the contents of the written application which he executed, making the same a part of the contract of insurance.

The legal presumption is, in the absence of fraud, that the insured read or had read to him the application before signing it. This being so, he was advised that the policy could not issue or take effect until the first premium was paid thereon in full.

The legal effect is that the insured covenanted with the company directly, and not through its agent, that the policy was not to be binding upon the company until the first premium was paid in full.

Is this contract to be enforced as clearly written, or is it to be ignored for the reason that men enter into contracts without reading them and assume that a vague and unproven custom exists permitting a local agent to give life and validity to the policy without reference to the terms of the contract of insurance?

The question may be put in another form. Can an insurance company enter into a contract with a person applying for insurance, which can so fix the precise conditions under which the policy shall issue, that the agent, in the absence of express authority, cannot abrogate it?

It would seem that the mere statement of the foregoing questions would compel an answer in favor of the company without argument.

189 An insurance company is entitled to have its contract enforced by the courts as written unless, as has been stated in many cases, to strictly construe it as against the insured would work a fraud upon him. As already pointed out, this might be the case in reference to the payment of the initial premium, where the only provisions in regard to the same are contained in the policy.

It cannot be said in this case, in the teeth of the express covenant of the insured contained in his application and carried into the policy with due reference to the same, that he

would be subjected to a fraud if the waiver of the agent, made without authority, is held not to abrogate the contract between him and the company, of which he is chargeable with full notice.

We are of opinion that it was error for the learned trial judge to instruct the jury that if they found that at the interview between the agents and the insured the general agent delivered the policy to the insured and agreed with him that the time of the payment of the first premium should be extended, and that in the meantime the policy should be in force, that their verdict should be for the plaintiff.

The order and judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

Haight, J., Dissented. He "supposed that a general agent of an insurance company could waive a condition of the policy requiring prepayment of premium, in order to make the policy binding, and that this proposition was settled so firmly by judicial authority as to be beyond question," and as supporting this proposition, cited Sheldon v. Atlantic etc. Co., 26 N. Y. 460, 84 Am. Dec. 213; Wood v. Poughkeepsie etc. Co., 32 N. Y. 619; Boehen v. Williamsburgh City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787. The idea that the law upon this subject could be evaded or annulled by printing on the policy a clause seemingly depriving agents of the power to give any information, make any representation or to extend the time for the payment of premium, he combatted at length in his dissenting opinion.

A Contract of Insurance may exist without the payment of the premium: Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119; Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854. Compare McDonald v. Provident etc. Assur. Soc., 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154. A provision in a policy that the insurer shall not be liable thereon until the first premium is actually paid, is waived by an unconditional delivery of the policy as a complete contract under an agreement that credit shall be given: Griffith v. New York Life Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; Farnum v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869. And a general agent of a life insurance company may waive the payment of the premium and deliver the policy, and thereby made it a valid and subsisting contract, notwithstanding a provision in the policy that it shall not take effect until the premium is paid: See the monographic note to New York Life Ins. Co. v. Babcock, 69 Am. St. Rep. 150. Compare Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 90 Am. St. Rep. 846, 88 N. W. 1013.

PEOPLE v. PIERSON.

[176 N. Y. 201, 68 N. E. 243.]

CRIMINAL LAW, Construction of—Who Bound to Furnish Medical Attendance to a Minor.—Under a statute making it criminal for a person to omit to perform a duty imposed on him by law, to furnish food, clothing, shelter or medical attendance to a minor, the persons subject to conviction are parents, guardians and those who, by adoption or otherwise, have assumed the relation in loco parentis. (p. 668.)

CRIMINAL LAW, Construction of.—The code provision making it criminal to omit, without lawful excuse, to perform a duty imposed by law to furnish food, clothing, shelter or medical attendance to a minor, means the necessary food, clothing, shelter or medical attendance required for the preservation of the health and life of the child. (p. 668.)

CRIMINAL LAW, Construction of—Medical Attendance for a Child, When must be Called.—Under a statute making it criminal to omit to furnish medical attendance to a minor, it is not necessary to call a physician for every trifling complaint with which a child may be afflicted. A reasonable amount of discretion is vested in parents. The standard is at what time would an ordinarily prudent parent, solicitious for the welfare of his child and anxious to promote its recovery, deem it necessary to call a physician. (p. 668.)

CRIMINAL LAW—Indictment for Failing to Furnish Medical Attendance to a Minor.—It is not necessary to allege that the case was one in which a regularly licensed and practicing physician ought to have been called, in an indictment under the Penal Code of New York for failing to furnish medical attendance to a minor. It is sufficient that the indictment state that the accused "did willfully, maliciously and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said female child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia," etc. (p. 669.)

CRIMINAL LAW—Medical Attendance on a Minor, Definition of.—The medical attendance to a minor, the omission of which is made criminal by the Penal Code of New York, is the attendance of a regularly licensed physician, or in other words, the attendance of one who, by the laws of the state, is authorized to practice medicine. (p. 672.)

CONSTITUTIONAL LAW—Christian Science or Divine Healing.—The statute making it criminal for parents and others to omit to furnish medical attendance to a minor does not violate the provisions of the constitution gauranteeing to all persons the free exercise and enjoyment of religious profession and worship. The religious belief of the accused does not constitute any defense to a prosecution under the statute, as where he omitted to call a physician because of his belief in divine healing which could be accomplished by prayer, and because he did not believe in physicians. (p. 673.)

J. Addison Young, for the appellant.

Robert E. Farley, for the respondent.

[203] HAIGHT, J. The indictment accused the defendant of the crime of violating section 288 of the Penal Code in that he "did willfully, maliciously, and unlawfully omit without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said (J. Luther Pierson's) female minor child, under the age of two years, the said minor [204] being then and there ill and suffering from catarrhal pneumonia, and he, the said J. Luther Pierson, then and there willfully, maliciously, and unlawfully neglecting and refusing to allow said minor to be attended and prescribed for by a regularly licensed and practicing physician and surgeon, contrary to the form of the statute in such case made and provided."

The facts disclosed upon the trial are without substantial dispute, and are in substance as follows: The defendant and his wife lived at Valhalla near White Plains, New York, with an infant girl sixteen and a half months old, whom they had adopted. In January, 1901, the child contracted whooping cough, which continued to afflict her until about the twentieth day of February, at which time catarrhal pneumonia developed, resulting in death on the 23d of February, 1901. The defendant testified that for about forty-eight hours before the child died he observed that her symptoms were of a dangerous character, and yet he did not send for or call a physician to treat her, although he was able financially to do so. His reason for not calling a physician was that he believed in Divine healing, which could be accomplished by prayer. He stated that he belonged to the Christian Catholic church of Chicago, that he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease.

In submitting the case to the jury the trial court charged, in substance. that before the jurors could convict the defendant they must find that he knew that the child was ill, and deliberately and intentionally failed or refused to call a physician, or to give the child such medicines as the science of the age would say would be proper that a child in its condition should have; that if at the time he refused to call a physician he knew the child to be dangerously ill, his belief constitutes no defense whatever to the charge made. In other words, no man can be permitted to set up his religious belief as a defense to the commission of an act which is in plain violation of the law of the state. The jury rendered a verdict of guilty [205] of the crime as charged. The appellate division has reversed, but, as we

have seen, has examined the facts and found no error therein, but rests its reversal upon what it considers to be errors of law. The majority of the court appears to have entertained the view that the indictment failed to charge a criminal offense, for the reason that it did not contain an allegation that the case was one in which a regularly licensed and practicing physician ought to have been called.

Section 288 of the Penal Code, so far as is material upon the question under consideration, provides as follows: "A person who: 1. Willfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor, ... or, 4. Neglects, refuses or omits to comply with any provisions of this section, ... is guilty of a misdemeanor."

It would seem that the legislative intent in adopting this provision of the code is reasonably clear, although possibly more precise language could have been employed. It contemplates that there are persons upon whom the law casts a duty of caring for minors, but it does not specify the persons. They are, however, those upon whom the duty is "by law imposed." They are designated in the statutes and in the common law as the parents, guardians, or those who by adoption or otherwise have assumed the relation in loco parentis. The duty of such a person is specified by the provisions of the section. It is "to furnish food, clothing, shelter, or medical attendance." Giving the statute a reasonable construction by applying the rule of necessity, it is apparent that it means the necessary food, clothing, shelter or medical attendance required for the preservation of the health and life of the child. We quite agree that the code does not contemplate the necessity of calling a physician for every trifling complaint with which the child may be afflicted which in most instances may be overcome by the ordinary household nursing by members of the family; that a reasonable amount of discretion is vested in parents, charged with the duty of maintaining and bringing up infant children; and that the [206] standard is at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician. But is it necessary that all of this should be set forth in the indictment? The indictment has alleged that the defendant unlawfully omitted to perform a duty imposed upon him, to furnish medical attendance for the child. If the medical attendance was not necessary, it was not a duty re-

quired of the defendant to furnish it; but if it was necessary, then it was his duty to furnish it, and his failure to do so would be an unlawful omission to perform a duty imposed, as charged in the indictment. We, therefore, think that the criticism made upon the indictment cannot be sustained.

It is now contended that section 288 of the Penal Code does not in terms, or in effect, make it the duty of anyone to furnish medical attendance to a minor child, and that under the common law it is not part of the duty of parents to provide medical attendance for their children. We have already considered, in part, the provisions of the section and have indicated our conclusion that the clause, "a duty by law imposed," as found in this section, had reference to the person upon whom the law imposed the duty of caring for minors, leaving it to the provisions of the section to particularize as to the character of those duties. In other words, that the section, properly construed, means that a person upon whom the law has imposed the duty to care for a minor, who willfully omits without lawful excuse to furnish such minor with necessary food, clothing, shelter or medical attendance, is guilty of a misdemeanor. Under this construction of the statute, the duty of parents to furnish medical attendance for their children is expressly provided for, and is made obligatory upon them, even if they were exempt from such duty under the common law. These views are in harmony with section 289 of the Penal Code, which provides that: "A person who: 1. Willfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved, [207] . . . . is guilty of a misdemeanor," and are also in accord with the view taken by this court in the case of Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464, in which the judgment of conviction was sustained, where the indictment charged the injury to the child's health by reason of a neglect to furnish and administer to it proper and sufficient medicine and furnish proper medical attendance, under the latter section of the code.

We are thus brought to a consideration of what is meant by the term "medical attendance." Does it mean a regularly licensed physician, or may some other person render "medical attendance"? The foundation of medical science was laid by Hippocrates in Greece five hundred years before the Christian era. His discoveries, experiences and observations were further developed and taught in the schools of Alexandria and Salerno,

and have come down to us through all the intervening centuries, yet medicine as a science made but little advance in northern Europe for many years thereafter; practically none until the dawn of the eighteenth century. After the adoption of Christianity by Rome and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the church, and are to-day looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the church, held at the beginning of the thirteenth century, physicians were forbidden, under pain of expulsion from the church, to undertake medical treatment without calling in a priest; and as late as two hundred and fifty years thereafter Pope Pius V renewed the command of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine power, continued throughout Christian Europe during the entire period of the Middle Ages, [208] and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I and Charles I, all possessed the power to cure epilepsy, scrofula and other diseases known as the king's evil; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this miraculous gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.

With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics in drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and such it has come to be

recognized in the law of our land. By the middle of the eighteenth century the custom of calling upon practitioners of medicine in case of serious illness had become quite general in England, France and Germany, and, indeed, to a considerable extent throughout Europe and in this country. From that time on the practice among the people of engaging physicians has continued to increase until it has come to be regarded as a duty, devolving upon persons having the care of others, to call upon medical assistance in case of serious illness. Schouler, in his work on Domestic Relations, at page 318, speaking upon the subject of parental duty in the maintenance of children, says: "It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced." And again, at page 548, speaking upon the subject of what constitutes necessary maintenance, he [209] says: "Food, lodging, clothes, medical attendance, and education, to use concise words, constitute the five leading elements in the doctrine of the infant's necessaries." In England the first statute upon the subject to which our attention has been called, was that of 31 and 32 Victoria, chapter 122, section 37, which made it the duty of persons having the care of infants to provide them with "medical aid." This statute was amended in 1894 by 57 and 58 Victoria, chapter 41, so as to read substantially the same as section 289 of our Penal Code, to which we have referred. Our own statute upon the subject was adopted as part of the Penal Code, chapter 676 of the Laws of 1881, containing the section under which the defendant is indicted.

Formerly, no license or certificate was required of a person who undertook the practice of medicine. A certificate or diploma of an incorporated medical college was looked upon by the public as furnishing the necessary qualification for a person to engage in the practice of such profession. The result was that many persons engaged in the practice of medicine who had acquired no scientific knowledge with reference to the character of diseases or of the ingredients of drugs that they administered, some of whom imposed upon the public by purchasing diplomas from fraudulent concerns and advertising them as real. This resulted in the adoption of several statutes upon the subject. The first statute to which we call attention is chapter 513 of the Laws of 1880, in which every person, before commencing to practice physic and surgery, is required to procure himself to be registered in the office of the clerk of the

county where he intends to practice, giving the authority under which he claims the right to engage in the profession, either by diploma or license, and making a violation of the provisions of the act a misdemeanor. Although this statute was an amendment of chapter 746 of the Laws of 1872, it is the first statute that we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical college conferring upon him the degree of doctor of medicine, or a certificate from the constituted authorities giving him the [210] right to practice. This was followed by the Laws of 1887, chapter 647, entitled, "An act to regulate the licensing and registration of physicians and to codify the medical laws of the state of New York," which has been further amended and carried into the Public Health Law of 1893, sections 140-153, inclusive, in which there is an absolute prohibition to practice physics unless the person be a regularly licensed physician in accordance with the provisions of the act.

It will be observed that the provision of the Penal Code under consideration was first adopted in 1881 following the statute of 1880 prohibiting the practice of medicine by other than physicians duly qualified in accordance with the provisions of the act. This, we think, is significant. The legislature first limits the right to practice medicine to those who have been licensed and registered or have received a diploma from some incorporated college conferring upon them the degree of doctor of medicine, and then the following year it enacts the provision of the Penal Code under consideration, in which it requires the procurement of medical attendance under the circumstances to which we have called attention. We think, therefore, that the medical attendance required by the code is the authorized medical attendance prescribed by the statute, and this view is strengthened from the fact that the third subdivision of this section of the code requires nurses to report certain conditions of infants under two weeks of age "to a legally qualified practitioner of medicine of the city, town or place where such child is being cared for," thus particularly specifying the kind of practitioner recognized by the statute as a medical attendant.

The remaining question which we deem it necessary to consider is the claim that the provisions of the code are violative of the provisions of the constitution, article 1, section 3, which provides that: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference,

shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious [211] belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." The peace and safety of the state involves the protection of the lives and health of its children as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children when born into the world are utterly helpless, having neither the power to care for, protect or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance if necessary, and an omission to do this is a public wrong which the state, under its police powers, may prevent. The legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. While it has no power to deprive persons of life, liberty or property without due process of law, it may, in case of the commission of acts which are public wrongs or which are destructive of private rights, specify that for which the punishment shall be death, imprisonment or the forfeiture of property: Barker v. People, 3 Cow. 686-704, 15 Am. Dec. 322; Lawton v. Steele, 119 N. Y. 226-236, 16 Am. St. Rep. 813, 23 N. E. 878; Thurlow v. Massachusetts, 5 How. (U. S.) 504-583.

We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the [212] Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health,

and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but the agent of the Almighty through which he accomplishes results, and that both science and Divine power may be invoked together to restore diseased and suffering humanity. But, sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature. We have considered the legal proposition raised by the record, and have found no error on the part of the trial court that called for a reversal. The other questions in the case involve questions of fact which are not brought up for review, and consequently are not before us for consideration.

The order of the appellate division reversing the judgment of conviction should be reversed, and the judgment of conviction of the trial court affirmed.

CULLEN, J. I concur in the opinion of Judge Haight. The state as parens patriæ is authorized to legislate for the protection of children. As to an adult (except possibly in the case of a contagious disease which would affect the health of others) I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other considerations.

Parker, C. J., Bartlett, Vann, Cullen and Werner, JJ., concur.

Martin, J., not voting.

On Christian Science as the practice of medicine, see First Church of Christ, Scientist, 205 Pa. St. 543, 97 Am. St. Rep. 753, 55 Atl. 536.

The Neglect of a Parent to provide for his child, or his abandonment of it, may be made a crime: See the monographic note to Booth v. People, 78 Am. St. Rep. 240, 245.

PEOPLE v. ADAMS.

[176 N. Y. 351, 68 N. E. 636.]

CONSTITUTIONAL LAW.—Articles 4 and 5 of the Amendments to the Constitution of the United States do not apply to actions in the state courts. (p. 677.)

EVIDENCE—Papers Illegally Taken from the Accused.—Private papers of an accused, unlawfully seized, are nevertheless admissible in evidence against him. (p. 679.)

CONSTITUTIONAL LAW—Compelling a Person to be a Witness Against Himself, What is not.—Receiving in evidence the private papers of an accused, unlawfully seized by officers of the law, is not the compelling of him to bear witness against himself, and the admission of such evidence is not a violation of the provision of the constitution against compelling any person in a criminal case to be a witness against himself. (p. 680.)

CONSTITUTIONAL LAW.—Section 344a of the Penal Code of New York Making It Criminal for Anyone to Have in His Possession Certain Papers commonly used in connection with a game or transaction known as "policy" is not unconstitutional. The papers to which the section refers are to be regarded the same as the tools of a burglar or the gambling apparatus which are dealt with in the code. (p. 680.)

CONSTITUTIONAL LAW—Statutes Making Certain Facts Presumptive Evidence of a Crime.—Section 344b of the Penal Code of New York providing that the possession by any person, other than a public officer, of certain papers used in carrying on, promoting or playing the game commonly called "policy" is presumptive evidence of the possession thereof knowingly and in violation of the provisions of section 344a of the same code, is constitutional. (p. 682.)

CONSTITUTIONAL LAW—Indeterminate Sentence.—A statute fixing a maximum and minimum sentence under which the board of commissioners of paroled prisoners may release a prisoner on parol after the service of the minimum sentence, leaving him liable to rearrest if he violates his parol before the expiration of the maximum term, is constitutional. (p. 683.)

CRIMINAL PROSECUTION—Rejecting Evidence as to the Nonexistence of a Search-warrant.—The rejection of evidence offered by an accused to show that certain papers received in evidence against him were procured by officers falsely claiming to be acting under a search-warrant is not error. The mode in which the evidence was procured is immaterial. (p. 683.)

Prosecution and conviction of the defendant of the crime of knowingly having in his possession a writing, paper and document representing and being a record of a chance, share and interest in numbers sold in a gambling game commonly called "policy," and of knowingly having possession of papers and devices such as are commonly used in carrying on and playing that game in violation of section 344a of the Penal Code. Sections 344a and 344b of the Penal Code of New York referred to in the opinion are as follows:

"Sec. 344a. A person who keeps, occupies or uses, or permits to be kept, occupied or used, a place, building, room, table, establishment or apparatus for policy playing or for the sale of what are commonly called 'lottery policies,' or who delivers or receives money or other valuable consideration in playing policy, or in aiding in the playing thereof, or for what is commonly called a 'lottery policy,' or for any writing, paper or document in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery; or who shall have in his possession, knowingly, any writing, paper or document, representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, or in what is commonly called 'policy,' or in the nature of a bet, wager or insurance, upon the drawing or drawn numbers of any public or private lottery; or any paper, print, writing, numbers, device, policy slip, or article of any kind such as is commonly used in carrying on, promoting or playing the game commonly called 'policy'; or who is the owner, agent, superintendent, janitor, or caretaker of any place, building, or room where policy playing or the sale of what are commonly called 'lottery policies' is carried on with his knowledge or after notification that the premises are so used, permits such use to be continued, or who aids, assists, or abets in any manner, in any of the offenses, acts or matters herein named, is a common gambler, and punishable by imprisonment for not more than two years, and in the discretion of the court, by a fine not exceeding one thousand dollars, or both."

"Sec. 344b. The possession, by any person other than a public officer, of any writing, paper, or document representing or being a record of any chance, share or interest in numbers sold, drawn or to be drawn, in what is commonly called 'policy,' or in the nature of a bet, wager or insurance upon the drawing or drawn numbers of any public or private lottery, or any paper, print, writing, numbers or device, policy slip, or article of any kind, such as is commonly used in carrying on, promoting or playing the game commonly called 'policy,' is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a."

L. Laflin Kellogg and Alfred C. Petté, for the appellant.

William Travers Jerome, district attorney, and Howard S. Gans, for the respondent.

[355] BARTLETT, J. As this is a unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain the verdict of the jury, it is only necessary to consider the facts sufficiently to determine the questions of law presented by this appeal.

It appears that the defendant occupied an office in the city of New York, wherein was his desk, trunk, tin boxes, and other articles of personal property. On a certain occasion when the defendant was in his office, the officers of the law appeared and stated that they had a search-warrant. The defendant replied, in substance, before they proceeded to execute the same, that it was not his office and that they would proceed at their peril. The officers thereupon placed the [356] defendant under arrest and searched the premises. A large amount of papers was seized, which may be divided into two classes: 1. The papers referred to in the section and the Penal Code under which this indictment was found; 2. And papers relating to the private affairs of the defendant.

The evidence discloses in detail the manner of conducting the gambling game known as "policy," from which it appears that certain papers are sent to a central point from different offices or places in the city where the game is conducted, known as "manifold sheets." Among the papers seized in defendant's office were three thousand five hundred of these "manifold sheets," upon some of which were indorsements and entries in his handwriting. At the trial these "manifold sheets" were introduced in evidence as papers described in section 344a of the Penal Code.

The private papers of the defendant were introduced in evidence for the double purpose of furnishing standards of his handwriting, and also tending to prove that the office, in which the papers relating to the game of policy were found, was occupied by him. There were also other books and papers put in evidence, in the handwriting of the defendant, relating to the entries on the "manifold sheets," that need not be more particularly described.

The first point made by the learned counsel for the appellant is that, by reason of the seizure of defendant's papers, as in the manner described, the defendant's constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures, was violated, and he was also thereby compelled to be a witness against himself in contravention of the fourth, fifth and fourteenth articles of the amendments

to the constitution of the United States, and article 1, section 6 of the constitution of the state of New York, and section 11 of the Bill of Rights of this state.

Articles 4 and 5 of the amendments to the constitution of the United States do not apply to actions in the state courts.

This first point, as stated, involves two distinct propositions 357 that must be separated in considering them. The first is an alleged violation of the Bill of Rights, which protects a citizen against unreasonable searches and seizures, and the other is an alleged violation of the constitution by compelling a person in a criminal case to be a witness against himself.

There were two classes of papers seized at the time the search-warrant was executed. The legality of the seizure of the papers described in the section of the Penal Code, under which the indictment was found, cannot be successfully challenged, it therefore remains to consider the effect of seizing the private papers of the defendant.

In Greenleaf on Evidence, volume 1, section 245a, the learned author says: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they were offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it frame issues to determine that question."

In Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910, it was held as follows: "Evidence which is pertinent to the issue is admissible although it may have been procured in an irregular or even an illegal manner. The trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent: Commonwealth v. Dana, 2 Met. 329, 337; Commonwealth v. Lottery Tickets, 5 Cush. 369, 374; Commonwealth v. Intoxicating Liquors, 4 Allen, 593, 600; Commonwealth v. Welsh, 110 Mass. 359; Commonwealth v. Taylor, 132 Mass. 261; Commonwealth v. Keenan, 148 Mass. 470, 20 N. E. 101; Commonwealth v. Ryan, 157 Mass. 403, 32 N. E. 349; 1 Greenleaf on Evidence, secs. 254a, 229; 1 Taylor on Evidence, sec. 922; 1 Bishop's Criminal Procedure, 3d ed., sec. 246."

In this state the same principle has been recognized in 358 Ruloff v. People, 45 N. Y. 213, and a kindred principle in People v. Van Wormer, 175 N. Y. 188, 195, 67 N. E. 299.

The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence.

In the case before us, if there has been any illegal invasion of the rights of this defendant, by reason of alleged unlawful searches and seizures of private papers, his remedy is in an independent proceeding not necessary to be considered at this time. We do not wish to be understood as expressing an opinion in regard to the seizure of defendant's private papers. When the officers entered the defendant's office he assured them he did not occupy it and that they would proceed at their peril. It is beyond dispute that the question as to who occupied the office was most material in connecting the defendant with the "manifold sheets" and other papers seized relating to the game of policy, and that the private papers were important in this connection. The same may be said as to the standards of defendant's handwriting.

The next question is whether this defendant was compelled to be a witness against himself in violation of the constitution of this state: Const., art. 1, sec. 6.

The appellant's counsel places great reliance upon the case of Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. Rep. 524, holding that an act of Congress which authorizes a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney be taken as confessed, was unconstitutional, being repugnant to the fourth and fifth articles of the amendments to the constitution of the United States.

Article 4 deals with searches and seizures and article 5 contains language identical with our state constitution, already quoted, to the effect that no person "shall be compelled in any criminal case to be a witness against himself."

359 In the case at bar, the defendant was not sworn as a witness, nor was he required to produce any books or papers. So far as this case is concerned, as already pointed out, the manner in which the witnesses for the people became possessed of the documentary evidence is a matter of no importance. We

are of the opinion, therefore, that the defendant was not, in any legal sense, called upon to be a witness against himself in this criminal proceeding.

The next point argued by the appellant's counsel is, that sections 344a and 344b of the Penal Code, under which the indictment was found and the conviction had, are unconstitutional and void, for the reason that the defendant has been deprived of his liberty and property without due process of law, in violation of both the federal and state constitutions.

We have here presented two distinct questions. We are unable to agree with the contention of appellant's counsel that these sections are to be read together. Section 344a creates the crime of which the defendant stands convicted; it is complete in itself and is in no way dependent upon the provisions of section 344b. The latter section establishes a rule of evidence only.

As to the alleged unconstitutionality of section 344a of the Penal Code: By article 1, section 9 of the constitution of this state, it is provided as follows: "Nor shall any lottery or the sale of lottery tickets, poolselling, bookmaking, or any other kind of gambling, hereafter be authorized by law within this state."

Section 336 of the Penal Code provides: "It is unlawful to keep or use any table, cards, dice or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places," etc.

Section 344a immediately follows a section of the Penal Code dealing with keeping betting and gambling establishments, and is an amplification of the law looking to the suppression of gambling, it being aimed at the game of "policy," [360] so called, which offered an opportunity to the poorer classes of making trifling bets and who could ill afford to lose their small earnings.

The papers referred to in section 344a are to be regarded the same as the tools of a burglar or the general gambling apparatus which are dealt with in the Penal Code.

The legislature, in addition to its ample general powers in dealing with the crime of gambling, has the sanction of the constitution of the state.

The legislature, in order to protect game, has made it an offense for a person to have in his possession game birds of

the kind specified after a certain date: Phelps v. Racey, 60 N. Y. 10, 14, 19 Am. Rep. 140. This court said in the case last cited: "The legislature may pass many laws, the effect of which may be to impair or even destroy the right of property. Private interests must yield to the public advantage. All legislative powers, not restrained by express or implied provisions of the constitution, may be exercised. . . . . The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body": See, also, People v. Buffalo Fish Co., 164 N. Y. 93, 79 Am. St. Rep. 622, 58 N. E. 34.

We have in the game laws a more extreme exercise of the legislative power to interfere with the ownership of property for the public good than is disclosed in the section under consideration. We are of the opinion that this section is constitutional.

Section 344b provides that the possession by any person, other than a public officer, of certain papers used in carrying on, promoting or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a.

The learned trial judge, in charging the jury, called their attention to this statute, and explained its application and limitations. To this charge no exception was taken, and the question of the constitutionality of this section, therefore, is not presented. In People v. Spiegel, 143 N. Y. 107, 113, 38 N. E. 284, it was held that a party may waive the benefit of even a constitutional provision.

As this is a question of public importance, we will disregard the alleged waiver and consider the merits.

As already stated, this section creates no offense, but prescribes a rule of evidence, subject to certain limitations.

In People v. Cannon, 139 N. Y. 32, 42, 43, 36 Am. St. Rep. 668, 34 N. E. 759, 762, this court said: "It is said the legislature can create and define a crime, but it cannot declare what shall be prima facie evidence of its commission. Whether the crime as defined by the legislature has been committed by the accused is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered prima facie proof can be given by the legislature. . . . . The legislature of this state possesses the whole legislative power of the people except so far as such power may be limited by our

constitution: Bank of Chenango v. Brown, 26 N. Y. 467. The power to enact such a provision as that under discussion is founded upon the jurisdiction of the legislature over rules of evidence, both in civil and criminal cases. This court has lately had the question before it: Board of Commrs. of Excise v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484. . . . . It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the legislature may, with some limitations, enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question." This principle has been approved in a number of states.

The legislature, in the section under consideration, has gone a step further and provided that the possession by any person, other than a public officer, of the various papers and writings used in carrying on, promoting or playing the game commonly called "policy," is presumptive evidence of possession thereof knowingly and in violation of the provisions of section 344a. In other words, the legislature has cast the burden of proof upon the person who has in his possession these incriminating [362] papers. The fullest opportunity is afforded him to rebut this statutory presumption. The exercise of this power is clearly within constitutional limitations and calculated to aid the people in prosecuting persons engaged in this form of gambling.

The appellant, in discussing this section, raises the additional point that it is class legislation, for the reason that it excepts from its provisions public officers.

It is argued that a notary public is a public officer, and that he might be knowingly in possession of these papers used in the game of policy with impunity.

It is true, if we give a literal construction to the language of this section, that the statement is warranted; but the rule is that all statutes must be reasonably construed, and in this case it is obvious that the legislature intended to except those public officers who, in the discharge of their official duties, were necessarily, at times, the custodians of these papers. The section under consideration is clearly constitutional.

The appellant makes the further point that the statute under which the defendant was sentenced to imprisonment for a term, the minimum of which shall be not less than one year, and the maximum shall be not more than one year and nine months, is unconstitutional.

Section 687a of the Penal Code was enacted in 1901, presumably in the interest of defendants who had never before been convicted of a felony. The fixing of a maximum and minimum sentence is to be considered in connection with the law relating to prisons: 2 Birdseye's Rev. Stats., 3d ed., secs. 74-83, pp. 2737, 2738, 2739. In brief it is provided (section 77) that the superintendent of state prisons shall cause to be kept a record of each prisoner therein confined upon an indeterminate sentence; and if it shall appear (section 78) to the board of commissioners of paroled prisoners that there is a reasonable probability that such prisoner will live and remain at liberty without violating the law, the board is permitted to release him on parole after service of the minimum sentence; but until the expiration of the maximum term he is not [363] absolutely discharged, and is liable to rearrest if he violates his parole. This is a merciful exercise of legislative power which has been repeatedly approved by the supreme court. This form of legislation has been sustained by the courts of many other states.

The provisions to which attention has already been called, relating to the release of paroled prisoners, remove some of the objections urged by the appellant. The legislation complained of is constitutional and in the interest of the defendant, who stands before the court charged with the first offense.

The appellant in his final point argues that the court erred to the prejudice of the defendant in refusing to allow evidence as to the nonexistence of a search-warrant at the time the papers were removed from the office of defendant.

We have already pointed out that the court will not take notice of the allegation that the possession of the papers offered in evidence on a criminal trial has been unlawfully acquired.

It follows that the questions asked of the witness Cuff were immaterial. The fact that an officer, engaged in the search of defendant's office for papers, testified that there was a search-warrant does not vary the situation.

The judgment of conviction and the order appealed from should be affirmed.

Parker, C. J., Gray, O'Brien, Haight, Martin and Vann, JJ., concur.

A Writ of Error was prosecuted to the supreme court of the United States, resulting in an affirmance of the judgment. That court, by Mr. Justice Day, after quoting sections 344a and 344b of the Penal Code of New York, said:

"The assignments of error in this court are: '1. That the court erred in holding that by the reception in evidence of the defendant's private papers seized in the raid of his premises, against his protest and without his consent, which had no relation whatsoever to the game of policy, for the possession of papers used in connection with which said game he was convicted, his constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was not violated, and that he was also thereby not compelled to be a witness against himself, in contravention of the fourth, fifth, and fourteenth articles of amendment to the constitution of the United States.

" '2. That the court erred in holding that the statute, sections 344a, 344b, of the Penal Code of the state of New York, under which the indictment against the plaintiff in error was found, and his conviction was had, did not deprive him of rights, privileges, and immunities secured to other citizens of the United States and of said state of New York, nor of liberty or property, without due process of law, nor of the equal protection of the laws, in violation of section 1 of the fourteenth article of amendment to the constitution of the United States.

" '3. That the court erred in affirming the judgment of conviction, and in refusing to discharge the plaintiff in error from custody.'

"The game of policy referred to in the sections of the statute quoted is a lottery scheme carried on, as shown in the testimony, by means of certain numbers procured at the shop or place where the game is played, and consists in an attempt to guess whether one or more of the series held by the player will be included in a list of twelve or at times thirteen of the numbers between one and seventy-eight, which are supposed to be drawn daily at the headquarters of the operators of the game. A person desiring to play the game causes the numbers to be entered on series of slips or manifold sheets. One of these pieces of paper containing the combination played by the person entering the game is kept by him and is known as a policy slip. Drawings are held twice a day, and the holder of the successful combination receives the money which goes to the winner of the game. About three thousand five hundred of these slips were found in the office occupied by the plaintiff in error, which was searched by certain police officers holding a search-warrant. The officers took not only the policy slips, but certain other papers, which were received in evidence against the plaintiff in error at the trial, against his objection, for the purpose of identifying certain handwriting of the defendant upon the slips, and also to show that the papers belonged to the defendant, and were in the same custody as the policy slips.

"So far as the case presents a federal question, the court of appeals of the state of New York held (People v. Adams, 176 N. Y. 351, ante, p. 675, 68 N. E. 636) that the fourth and fifth amendments to the

constitution of the United States do not contain limitations upon the power of the states, and proceeded to examine the case in the light of similar provisions in the constitution and Bill of Rights of that state.

"We do not feel called upon to discuss the contention that the fourteenth amendment has made the provisions of the fourth and fifth amendments to the constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states. An examination of this record convinces us that there has been no violation of these constitutional restrictions, either in an unreasonable search or seizure, or in compelling the plaintiff in error to testify against himself.

"No objection was taken at the trial to the introduction of the testimony of the officers holding the search-warrant as to the seizure of the policy slips; the objection raised was receiving in evidence certain private papers. These papers became important as tending to show the custody by the plaintiff in error, with knowledge, of the policy slips. The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority, as well as reason, limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in 1 Greenleaf on Evidence, sec. 254a: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'

"The author is supported by numerous cases. Of them, perhaps, the leading one is Commonwealth v. Dana, 2 Met. 329, in which the opinion was given by Mr. Justice Wilde, in the course of which he said: 'There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search-warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice

how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of Legatt v. Tollervey, 14 East, 302, and Jordan v. Lewis, 14 East, 306, note, and we are entirely satisfied that the principle on which these cases were decided is sound and well established.'

"This principle has been repeatedly affirmed in subsequent cases by the supreme judicial court of Massachusetts; among others, Commonwealth v. Tibbetts, 157 Mass. 519, 32 N. E. 910. In that case a police officer, armed with a search-warrant calling for a search for intoxicating liquors upon the premises of the defendant's husband, took two letters which he found at the time. Of the competency of this testimony the court said:

"'But two points have been argued. The first is that the criminatory articles and letters found by the officer in the defendant's possession were not admissible in evidence because the officer had no warrant to search for them, and his only authority was under a warrant to search her husband's premises for intoxicating liquors. The defendant contends that under such circumstances the finding of criminatory articles or papers can only be proved when, by express provision of statute, the possession of them is itself made criminal. This ground of distinction is untenable. Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal, manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent': Commonwealth v. Acton, 165 Mass. 11, 42 N. E. 329; Commonwealth v. Smith, 166 Mass. 379, 44 N. E. 503.

"To the same effect are Chastang v. State, 83 Ala. 29, 3 South. 304; State v. Flynn, 36 N. H. 64. In the latter case it was held: 'Evidence obtained by means of a search-warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search-warrant was illegally issued': State v. Edwards, 51 W. Va. 220, 41 S. E. 429; Shields v. State, 104 Ala. 35, 53 Am. St. Rep. 17, 16 South. 85; Bacon v. United States, 38 C. C. A. 31, 97 Fed. 35; State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; Williams v. State, 100 Ga. 511, 28 S. E. 624; State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; Trask v. People, 151 Ill. 523, 38 N. E. 248; Starchman v. State, 62 Ark. 538, 36 S. W. 940.

"In this court it has been held that if a person is brought within the jurisdiction of one state from another, or from a foreign coun-

try, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the state wherein he had committed an offense: Ker v. Illinois, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. The case most relied upon in argument by plaintiff in error is the leading one of Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. Rep. 524. In that case a section of the customs and revenue laws of the United States authorized the court in revenue cases, on motion of the government's attorney, to require the production by the defendant of certain books, records and papers in court, or otherwise the allegation of the government's attorney as to their contents to be taken as true. It was held that the act was unconstitutional and void as applied to a suit for a penalty or a forfeiture of the party's goods. The case has been frequently cited by this court and we have no wish to detract from its authority. That case presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on a pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government. The court held, in an opinion by Mr. Justice Bradley, that such procedure was in violation of both the fourth and fifth amendments; the chief justice and Justice Miller held that the compulsory production of such documents did not come within the terms of the fourth amendment as an unreasonable search or seizure, but concurred with the majority in holding that the law was in violation of the fifth amendment. This case has been cited and distinguished in many of the cases from the state courts which we have had occasion to examine.

"The supreme court of the state of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, Were the papers found in the execution of the search-warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the state of New York. He was not compelled to testify concerning the papers or make any admission about them.

"The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the Boyd Case, 116 U. S. 616, 6 Sup. Ct.

Rep. 524. The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English, and nearly all of the American, cases, have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. In Boyd's case the law held unconstitutional virtually compelled the defendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the fourth and fifth amendments. The right to issue a search-warrant to discover stolen property or the means of committing crimes is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if, in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration: If a search-warrant is issued for stolen property, and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

"It is further urged that the law of the state of New York (section 344b) which makes the possession by persons other than a public officer of papers or documents, being the record of chances or slips in what is commonly known as policy, or policy slips, or the possession of any paper, print, or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly, in violation of section 344a, is a violation of the fourteenth amendment to the constitution of the United States in that it deprives a citizen of his liberty and property without due process of law. We fail to perceive any force in this argument. The policy slips are property of an unusual character, and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor, in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the state

to prescribe the evidence which is to be received in the courts of its own government: Fong Yue Ting v. United States, 149 U. S. 698-729, 13 Sup. Ct. Rep. 1016.

"It is argued, lastly, that section 344b is unconstitutional because the possession of the policy tickets is presumptive evidence against all except public officers, and it is urged that public officials, from the governor to notaries public, would thus be excluded from the terms of the law which apply to all nonofficial persons. This provision was evidently put into the statute for the purpose of excluding the presumption raised by possession where such tickets or slips are seized and are in the custody of officers of the law. This was the construction given to the act by the New York courts, and is the only one consistent with its purposes. The construction suggested would lead to a manifest absurdity, which has not received, and is not likely to receive, judicial sanction. We find nothing in the record before us to warrant a reversal of the conclusions reached in the New York court of appeals, and its judgment will be affirmed."

Papers Obtained by Lawful Search or seizure are generally held not inadmissible in evidence on that account, but some authorities take a different view of the question: See the monographic note to State v. Height, 94 Am. St. Rep. 345.

The Legislature may Enact that Certain Facts shall be prima facie evidence, even in criminal cases, of the main fact in question: Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303. Compare Ex parte Kameta, 36 Or. 251, 78 Am. St. Rep. 775, 60 Pac. 394.

The Power of Courts to Suspend Sentence and Release on Parole is discussed in People v. Barrett, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, and cases cited in the cross-reference note thereto.

MAAS v. GERMAN SAVINGS BANK.

[176 N. Y. 377, 68 N. E. 658.]

CONFLICT OF LAWS.—The Succession to, and the Distribution of, the Estate of an Intestate are governed by the law of the domicile. (pp. 690, 691.)

FOREIGN ADMINISTRATORS.—Where an administrator has been appointed and has properly qualified in the state of the domicile of the intestate, he is vested with power to receive payment of debts and to take possession of assets and give proper acquittances therefor wherever the debtors or the holders of the assets may be, within or without the state; but where the debtor or the holder of the assets is in a foreign jurisdiction, and the debts are not paid or the assets surrendered to the administrator of the domicile, the courts of the foreign jurisdiction will not enforce a recovery of such debts or assets until an administrator has procured ancillary letters or a new administrator has been appointed under the laws of the state where the debts exist or the assets are. (p. 691.)

FOREIGN ADMINISTRATORS.—A Voluntary Payment to a Foreign Administrator is Valid although an administrator **has been** appointed in the state, it not being the domicile of the intestate, **and** the person paying having no actual notice of such appointment. (p. 692.)

NOTICE, Constructive, of the Appointment of an Administrator.—The fact that the appointment of an administrator is made of record in the surrogate's office does not operate as constructive notice of such appointment, so as to invalidate a payment subsequently made to an administrator appointed in the state of the domicile of the decedent. (p. 693.)

Thomas F. Gilroy, Jr., for the appellant.

Erwin I. Spink, for the respondent.

379 HAIGHT, J. Frieda Maas died at her residence in Guttenberg, Hudson county, state of New Jersey, on the fifteenth day of November, 1898, leaving her surviving a son and daughter, both minors and residents of the same place. On the twenty-third day of August, 1899, the surrogate of Hudson county, New Jersey, issued letters of administration upon her estate to Frederick Maas, a brother of her deceased husband. After his appointment he presented a certified copy of his letters of administration to the defendant bank, together with her pass-book, and demanded the payment to him of the amount which the decedent had upon deposit, and thereupon the bank paid over such balance to him. Prior thereto, and on the ninth day of March, 1899, the plaintiff, Charles Maas, another brother of the decedent's deceased husband, applied and had issued to him letters of administration upon her estate by the surrogate of New York county in this state, and after the defendant bank had paid the amount on deposit with it to the administrator appointed in New Jersey, he served a notice of his appointment upon the defendant and demanded the payment to him of the amount of such deposit. The bank having refused, this action was brought to recover the amount thereof. Upon the trial the facts were agreed upon. It does not appear that the decedent had any creditors in this state, and it is conceded that the defendant bank in making its payment did so in good faith, without actual notice that letters of administration had been issued in this state. The question 380 thus presented is as to whether the plaintiff, under such circumstances, can recover.

The succession to, and the distribution of, the estate of an intestate is governed by the law of the domicile, and where an administrator has been appointed and has properly qualified

in the state of the domicile, he is vested with power to receive payment of the debts owing to the intestate, and to take possession of the assets and give proper acquittances therefor, wherever the debtors or the holders of the assets may be, within or without the state. But where the debtor or the holder of the assets is in a foreign jurisdiction and the debts are not paid or the assets surrendered to the administrator of the place of the domicile of the decedent, the courts of the foreign jurisdiction will not enforce the recovery of such debts or assets until the administrator has procured ancillary letters or a new administrator has been appointed under the laws of the place where the debts exist or the assets may be: Matter of Prout, 123 N. Y. 70-74, 27 N. E. 948; Parsons v. Lyman, 20 N. Y. 103; Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; Matter of Estate of Butler, 38 N. Y. 397; Despard v. Churchill, 53 N. Y. 192; Matter of Hughes, 95 N. Y. 55; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94; Appeal of Gray, 116 Pa. St. 256-262, 11 Atl. 66; Wilkins v. Ellett, 9 Wall. 740; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. Rep. 641; Matter of Cape May etc. Co., 51 N. J. L. 78-82, 16 Atl. 191; Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 15 Sup. Ct. Rep. 494, 22 N. E. 572. In the latter case, Earl, J., in answering the claim that the administrator derived his authority from the state of New Jersey, and that a payment could not legally be made to him, says: "Payment to the personal representative is good. because at the death of the intestate he becomes entitled to all his personal property wherever situated, and having the legal title thereto he can demand payment of choses in action; and a payment to him made anywhere, in the absence of any conflicting claim existing at the time, is valid. It is true that if the defendant had declined payment the foreign administrator could not have brought action in this state to enforce it. But [381] a voluntary payment to such an administrator has always been held valid. Therefore, in receiving this payment Mr. Knittel was the representative of the deceased and able to give an effectual discharge to the defendant." In that case a will of the decedent was subsequently found and admitted to probate. It was, however, held that the letters of administration theretofore issued were not void, and until they were revoked persons dealing with the administrator in good faith were protected. It is thus apparent that the administrator of the domicile was vested with the power to collect all of the outstanding debts owing to the intestate, and that where payments

were made to him in good faith the debt was discharged. So far all of the authorities appear to be in accord. This narrows the discussion to the question arising out of the fact that an administrator had been appointed in this state before the administrator of the domicile had applied for and obtained the deposit in the defendant bank.

Statutory provisions for the issuing of ancillary letters appear as early as the first revision of the statutes, and, with some changes, have been continued to the present time. The purpose of such letters was undoubtedly intended to aid foreign executors and administrators in the collection of claims against persons residing in this state, and to operate as a protection for home creditors. We consequently have provisions authorizing the surrogate to require security of administrators sufficient to protect creditors (Laws 1863, c. 403); and finally the surrogate is authorized by his decree on final accounting of administrators, after having fully protected the rights of the creditors within this state, to transmit the money and other personal property remaining of the decedent to the state, territory or county where the principal letters were granted, to be disposed of pursuant to the laws of that state: Code Civ. Proc., secs. 2700, 2701.

It is thus apparent that the plaintiff upon receiving letters of administration in this state became entitled to the assets of his intestate, and had the right to collect from the defendant the amount she had on deposit in the bank at the time of her decease. He, however, was required to act with reasonable dispatch. He could not be permitted to remain silent and suffer the administrator of the domicile to collect the debts and carry away the assets, without objection or the disclosing of his appointment as administrator in this state to the persons owing the debts or having the custody of the assets, and then recover from them. As we have seen, the plaintiff was appointed administrator in this state on the ninth day of March, 1899, and for five months and a half thereafter he remained idle, taking no steps to give notice to the defendant bank of his appointment, or to make any demand upon it to pay him the amount on deposit, until after the administrator of the domicile had called upon the bank for payment and received the amount due from it to the estate. We consequently conclude that the act of the bank, in making the payment to him in good faith without knowledge that another administrator

had been appointed in this state, operated as a discharge of the indebtedness.

It is contended on behalf of the plaintiff that the defendant had constructive notice of the appointment of an administrator in this state, arising out of the fact that the appointment of the plaintiff was a matter of record in the surrogate's office. We, however, are not inclined to adopt this view. Such a rule would seriously interfere with the collection of debts, and would become exceedingly burdensome to debtors. It might be impossible for them to determine the counties in the state in which the decedent had personal property. It would, therefore, become necessary for them to examine the records of every surrogate's office in the state in order to determine whether an administrator had been appointed.

The judgment should be affirmed, and judgment absolute ordered for the defendant upon the stipulation, with costs.

Parker, C. J., Gray, O'Brien, Martin and Werner, JJ., concur; Cullen, J., not voting.

Letters of Administration have no extraterritorial operation, and do not, as a matter of right, confer authority over personal assets found without the jurisdiction from which the grant is derived: Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80, 25 South. 229; Succession of Gaines, 46 La. Ann. 252, 49 Am. St. Rep. 324, 14 South. 602; Estate of Crawford, 68 Ohio St. 58, 96 Am. St. Rep. 648, 67 N. E. 156. But an administrator may receive a voluntary payment from a foreign debtor, which will be a discharge of the debt, at least if no ancillary administrator has been appointed up to that time: See Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; monographic note to Shinn's Estate, 45 Am. St. Rep. 667, 668, on the powers and duties of administrators and executors as to property outside of the state. On the relative powers and duties of principal and ancillary administrators, see the monographic note to Goodall v. Marshall, 35 Am. Dec. 483-490; Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; Bealey v. Smith, 158 Mo. 515, 81 Am. St. Rep. 317, 59 S. W. 984.

HOLLY v. GIBBONS.

[176 N. Y. 520, 68 N. E. 889.]

EQUITY, Jurisdiction of, to Compel Executors to Exercise a Power Contained in a Will.—A court of equity has jurisdiction to compel the exercise by an executor of a power of sale contained in a will for the purpose of satisfying a debt due from the testator. (p. 696.)

LIMITATIONS, STATUTE OF—Executor's Power to Prevent the Running of.—There is a distinction between the right of an executor to revive an indebtedness against his testator's estate and his right to acknowledge and keep in force a subsisting obligation by making payments on the principal debt or by way of keeping down the interest. In the one case he creates an indebtedness, while in the other he performs a moral obligation and executes a duty recognized by law. (p. 697.)

RES JUDICATA.—A Decree by a Surrogate that a Creditor's Petition be Dismissed and that the proceeding to compel the executor to account is barred by the statute of limitations, does not estop the creditor from maintaining an action subsequently on his demand, when, by the statute of the state, the fact that a claim is disputed deprives the surrogate of jurisdiction to determine its validity. (p. 698.)

PRACTICE—Defect of Parties.—To a Suit to Compel an Executor to Exercise a Power of Sale Contained in a Will for the purpose of obtaining money with which to pay debts of the testator, his daughter, who is one of his heirs at law and who, as devisee under the will, is entitled to the proceeds of the sale of a specified farm after the payment of all claims against his estate, is a necessary party. (p. 699.)

EQUITY—Parties, General Rule Concerning.—All persons who are interested directly or indirectly in the subject matter and in the relief granted by the decree should be brought into the suit. (p. 699.)

EXECUTORS, Power of Sale Given to Should not be Authorized to be Exercised by Referee.—In a suit to compel an executor to exercise a power of sale contained in a will to raise money to pay the debts of his testator, the court should not direct the sale to be made by the referee. Unless the executor is found to be unfit or incapacitated to execute the power, the judgment should direct him to execute the sale. (p. 699.)

Suit by the administrator of Betsy Ann Gibbons, widow of Ransom H. Gibbons, against his executor, Edward Gibbons, to compel the exercise of a power of sale. Sally Maria Peck and Edward Gibbons were children and only heirs at law of the testator, and both were made parties defendant. The testator gave his note to his wife for two thousand eight hundred dollars, bearing interest at the rate of nine per cent per annum. The answer relied upon the statute of limitations and an adjudication of the surrogate court. The trial court sustained the plaintiff's suit and decreed the sale of real property under

a power in the testator's will, and that the amount found due was recoverable against the defendant Edward Gibbons individually, as well as executor, and that the sale of the real property be made at public auction by a referee. On appeal to the appellate division of the third department of the supreme court, it struck from the decree that part relating to the collection of a deficiency from Edward Gibbons, and otherwise the decree was affirmed. The defendant Edward appealed individually as well as executor. By his will, the testator gave his son Edward the Huyck farm, to hold in fee, unless he should die without issue, in which event the property should go to the testator's daughter, Mrs. Peck. The will authorized the executor to sell the "Jay Gibbons farm" for the purpose of paying his debts and for the interest of his daughter, the proceeds, after paying such debts, to be given to her to the amount of four thousand dollars, and any overplus to be divided between her and her brother. During his lifetime, the testator paid the interest accruing on the note, and his executor acknowledged its validity and paid the interest accruing until the death of the widow, in 1893. The note was presented to the executor by the widow's administrator, and the former admitted its validity and promised to pay it, but requested that the note should remain as it was and that the real property be not sold for its payment and paid the interest down to March, 1897. In September, 1899, the executor informed the plaintiff that he was forbidden to make any further payments, and that none would be made. The plaintiff thereupon commenced a proceeding before the surrogate to compel the executor to account. The latter, by his answer, denied that the plaintiff was a creditor, and pleaded the statute of limitations. The surrogate made a decree declaring "that more than six years and eighteen months having elapsed since the appointment of said Edward Gibbons as executor, this proceeding to compel the executor to account is barred by the statute of limitations," and "that the petition should be dismissed." Mrs. Peck, the daughter of the decedent, was named as a defendant, but she was a nonresident of the state and did not appear in the action. The trial court gave judgment in favor of the plaintiff, which was modified and affirmed by the appellate division of the third judicial department of the supreme court.

Walter E. Ward, for the appellant.

John H. Gleason, for the respondent.

[525] GRAY, J. The judgment, which the plaintiff now has, validates the claim against the testator's estate and authorizes the disposition of the real estate devised by the will by a sale, for the purpose of satisfying the amount found to be due. In so far as the plaintiff seeks the equitable intervention of the court to compel the exercise by the executor of the power of sale [526] contained in the will, the action is clearly maintainable, assuming that the debt has been conclusively established. The testator expressly empowered his executor to sell the "Jay Gibbons farm," "for the purpose of paying debts and for the interest of his daughter," in order that, the debts being thus paid, the residue of the proceeds of sale of that and of the other real estate mentioned in the clause might be given to the latter. The power of sale thus given was imperative and imposed a duty on the executor, the performance of which might be compelled in equity for the benefit of the creditors, or the daughter: 2 Rev. Stats., p. 734, sec. 96. The debts were not made a charge upon the testator's real estate; but a power to sell certain portions of it for their payment was given, the execution of which in nowise depended upon the will of the grantee of the power. Hence, the remedy of the creditor, upon the failure to exercise the power of sale, was by application to a court of equity: Matter of Gantert, 136 N. Y. 106, 32 N. E. 551. The sale of the real estate for the payment of the debts is not, as it is argued, to be effected solely through proceedings provided for in the Code of Civil Procedure. Section 2759 provides that a decree directing the disposition of real property, in a case where, under section 2750, the creditor of the decedent has instituted a proceeding for that purpose, can be made only where the property directed to be disposed of is not subject to a valid power of sale for the payment of the debts: Code Civ. Proc., sec. 2759, subd. 4.

The action, therefore, was maintainable, if the claim of the creditor was an enforceable one, and, as to that, the appellant argues that the executor could not, by the acknowledgment of the debt, prevent the statute of limitations from running. He argues, in effect, that the principle of the rule, which prevents an executor from reviving a debt against the estate of his testator which is barred by the statute, applies equally to his right to keep a debt alive. I perceive no force in such an argument; nor am I aware of any authority in reported cases which would support it. The demand of the plaintiff was upon an

obligation of the testator, subsisting at the time of [527] his death and for which his estate was concededly liable. It was the right and it was the duty of the executor to discharge the indebtedness upon the obligation, either from the personal estate, or, if that was insufficient, by the exercise of the power of sale given to him by the will. There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate, which had been extinguished by law, and his right to acknowledge, and to keep in force, a subsisting obligation, by making payments from time to time upon the principal of the debt, or by way of keeping down the interest: McLaren v. McMartin, 36 N. Y. 88; Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643. In the one case he, in effect, creates an indebtedness; while, in the other, he is performing a moral obligation and is executing a duty recognized by law.

It is further objected by the appellant that a former adjudication in the surrogate's court was a bar to the maintenance of this action. In my opinion, that is not the effect of the surrogate's decree referred to. All that decree effected was, as it states, the dismissal of the creditor's petition. The statement which it contained, that "the proceeding to compel the executor to account is barred by the statute of limitations," was not a final adjudication upon the validity of the petitioner's claim. It was the conclusion of the surrogate that, by reason of the lapse of time, the executor could not be compelled to account in such a proceeding. Whether the surrogate was correct or not in that respect is not material. He, in effect, nonsuited the petitioner, by dismissing his petition, and in so doing has complied with certain provisions of the Code of Civil Procedure. By section 1822 it is provided that where an executor rejects a claim against the estate, "unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor, ... the claimant must commence an action for the recovery thereof," etc. By section 2722, if a petition is presented to the surrogate's court by a creditor, praying for a [528] decree directing the executor to pay his claim, it is provided that the surrogate must dismiss the petition, "without prejudice to an action or an accounting," where the latter files a written answer, setting forth facts which show "that it is doubtful whether the petitioner's claim is valid and legal and denying its validity or legality." Obviously, if the proceeding were one in which

the executor was called upon to render his account by a creditor, the validity of whose claim is either expressly denied, or is shown to be doubtful, the result must be the same, as to the surrogate's jurisdiction. I do not think we can say that the filing of a petition by a creditor, and of an answer thereto by the executor denying the validity of a claim, was equivalent to the filing of the written consent required by the statute. The fact that the claim was disputed deprived the surrogate of jurisdiction to determine its validity and to decree its payment: Matter of Callahan, 152 N. Y. 320, 46 N. E. 486.

It is further argued that this action cannot be maintained against the devisees individually. The order of the appellate division struck out any recovery against the executor, individually, of any deficiency judgment and there was no judgment at all against Mrs. Peck. Whether the judgment is maintainable for the sale of the real estate devised to Edward Gibbons is somewhat doubtful, inasmuch as the averments of the complaint and the proofs do not seem in sufficient compliance with the provisions of the code with reference to an action against devisees and Mrs. Peck was not brought into the action: Code, secs. 1843, 1846, 1849, 1851. But, as the judgment must be reversed and a new trial ordered for the failure to bring in Mrs. Peck, we will not discuss this question.

The serious feature of this case, and one which requires the reversal of the judgment, is that Mrs. Peck, though made a defendant by name, was never brought into the litigation by a legal service upon her of the summons. The order for the service of the summons upon her was not founded upon the affidavit, which section 439 of the code requires to be made. Indeed, the respondent conceded, in open court, that there [529] was no such legal service; but he says that Mrs. Peck has "no interest, vested or contingent, in the land devised, or in that directed to be sold, and that, therefore, she is not a necessary party to the action." This contention seems rather extraordinary, in view of the allegations of the complaint, to the effect, not only that Mrs. Peck is a devisee under the will and holds as such, but that the payments made by the executor upon the note and the delay by him in the sale of the real estate were with her knowledge and consent, and in view of the findings, which recited the facts of a personal service upon her of the summons and complaint and of her knowledge of, and consent to, the executor's acts. If we might disregard these matters, as not necessarily conclusive upon the respondent, we

still are confronted with the fact that Mrs. Peck did have an interest in the estate of the testator and in the enforcement of the power of sale contained in the will, which made her a necessary party to the action, without whose presence the court would acquire no jurisdiction to render any decree, which would affect her legal or equitable interests. Under the third clause, by which the "Huyck farm" was given to the testator's son, "unless he should die without legal issue," in which case it was to go to his daughter, Mrs. Peck, she took no interest, because the son survived the testator and the estate had vested in him. Under the fourth clause, however, which empowered the executor to sell the "Jay Gibbons farm" and the residence, for the purpose of paying debts and applying the surplus to the testator's daughter, her interests are very clear and substantial. As one of the two heirs at law of the testator, she had an interest in such real estate, which was subject, of course, to the exercise of the power of sale. Having such, her interest in any legal proceeding, wherein it was sought to compel a sale for the purpose of paying claims against the testator's estate, was very substantial. She was very much concerned, by reason of her legal and equitable interests, that such claims should be satisfactorily and legally established, as obligations of the testator which were actually subsisting against his estate. It 530 cannot truthfully be said that Mrs. Peck had no interest which could be injuriously affected by the result of this litigation, and, therefore, within those rules which govern the judgment of a court of equity, she should have been brought into the litigation. Courts of equity observe a fundamental principle concerning parties, that all persons who are interested, directly or indirectly, in the subject matter and in the relief to be granted by decree, should be brought into the suit. When it appears that their rights might be affected thereby, and they are capable of being made parties, a court of equity should not proceed to decide the case without them: Story's Equity Jurisprudence, sec. 1526; Pomeroy's Equity Jurisprudence, sec. 114.

In the absence of Mrs. Peck as a party to the action, the court did not obtain jurisdiction to render a judgment for the sale of the testator's real estate.

It was also quite unnecessary to the judgment to direct a sale of the real estate through a referee. I am not aware of any authority in the law of such procedure. It not having

been charged, or found, that the executor was unfit, or without capacity to execute the power of sale, the judgment of the court should have directed him to effect the sale.

For the reasons I have given, I advise that the judgment appealed from should be reversed and that a new trial should be ordered, with costs to abide the event.

Haight, Vann, Cullen and Werner, JJ., concur.

Bartlett, J., votes for reversal on the ground that Mrs. Peck had such an interest in the "Jay Gibbons farm" as rendered her a necessary party defendant.

Parker, C. J., not sitting.

Limitations.—The authorities are not uniform on the question whether an executor can revive a debt which has been barred by the statute of limitations. It would seem, however, that he may interrupt the running of the statute when the debt is not yet barred: See the monographic note to Fletcher v. American Trust etc. Co., 78 Am. St. Rep. 189, 190. As to his right to pay barred debts, see Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33.

Power of Sale.—The failure of executors to exercise a power of sale contained in a will within a fixed time as directed, does not destroy the power. It only takes away the discretion of the executors as to the time of the exercise of the power, and makes it their absolute duty to exercise it upon the expiration of the time fixed: Fahnestook v. Fahnestook, 152 Pa. St. 56, 34 Am. St. Rep. 623, 25 Atl. 313.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

HOLLY SHELTER RAILROAD COMPANY v. NEWTON.

[133 N. C. 136, 45 S. E. 549.]

THE WRIT OF PROHIBITION is not a Writ of Right, but its issuance is a matter of discretion, and it will issue only in cases of extreme necessity. (p. 702.)

PROHIBITION, WRIT OF—Exercise of Right of Eminent Domain.—A writ of prohibition will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad. (p. 704.)

Rountree & Carr and J. D. Bellamy, for the petitioners.

I. Meares, for the respondent.

137 CLARK, C. J. This is an application by the defendants for a writ of prohibition upon the following state of facts: The plaintiff, on the face of the papers a duly incorporated railroad company, on the 7th of July, 1903, filed a petition before the clerk of the superior court of Pender county for condemnation of a right of way over the defendants' land. On the 22d of July, 1903, the defendants appeared before the clerk and objecting specially to the sufficiency of service of summons upon one of the defendants, filed an answer raising, as they claim, issues of fact, and asked that the cause be transferred to the superior court at term. This being refused, the defendants appealed to the judge, who, on the 12th of September, 1903, allowed the plaintiff to amend by filing an amended profile (Faison v. Williams, 121 N. C. 152, 28 S. E. 188), and remanded the cause to the clerk with directions to proceed and hear the cause, giving ten days' notice to each party. From this

order of the judge the defendants appealed. The clerk being correctly of opinion that this order of the judge was interlocutory and that no appeal lay, proceeded to execute the order of the court by giving due notice that on the 24th of September he would proceed with the hearing. The defendants ask for a writ of prohibition to the clerk, alleging that irreparable damages will accrue if the clerk proceeds with the hearing and shall appoint commissioners to assess damages.

The writ of prohibition can issue only from this court, and is authorized by article 4, section 8 of the constitution. It only issues in cases where it is necessary to restrain the action of the lower courts, proceeding outside of their powers, and even then it is not a writ of right, but its issuance is a matter of discretion, and it "issues only in cases of extreme necessity": 23 Am. & Eng. Ency. of Law, 2d ed., 212; High on Extraordinary Remedies, secs. 763, 765. It will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage [188] will be done: State v. Allen, 24 N. C. 183; Perry v. Shepherd, 78 N. C. 83; State v. Whitaker, 114 N. C. 818, 19 S. E. 376. These seem to be the only cases in which application for this extraordinary remedy has been made in this state, and in all of them it was refused. In State v. Allen, 24 N. C. 183, Gaston, J., says the writ should not issue except in a very clear case, peremptorily calling for an immediate remedy, and then only after notice to the opposite side and upon affidavits. In State v. Whitaker, 114 N. C. 818, 19 S. E. 376, it was said that if the emergency was so great and immediate that notice could not be given, a notice to show cause would issue with a stay of proceedings.

In the present case no appeal lay from the order of the judge remanding the case to the clerk to proceed, and the attempted appeal, if perfected, would be dismissed here, being taken without authority of law. Of course, this court could not issue its prohibition to the clerk against executing the order of the judge when there has been no appeal authorized by law. While the general rule is, as set out in the Code, sections 116 and 256, that upon issues of fact or law arising before the clerk the cause is transferred at once to the court at term, in this matter of condemnation of right of way for railroads, for reasons of public policy and to prevent delays by appeals from interlocutory judgments which would seriously

interfere with the construction of railroads, it is specially provided otherwise: Norfolk etc. R. R. Co. v. Warren, 92 N. C. 622.

The Code, section 1945, provides that the clerk shall hear and decide the application for condemnation and appoint commissioners, and section 1946 provides that upon the coming in of the report, exceptions may be filed "and upon the determination of the same by the court, either party may appeal to the court at term, and thence, after judgment, to the supreme court." This last section provides further that upon the payment into court of the sum appraised as damages, [139] the company may enter upon the right of way, "notwithstanding the appeal," and that if on appeal the court refuses to affirm the condemnation of the and, the company shall surrender the land, with power in the court to issue a writ of restitution, and that it shall adjudge what portion of the fund paid into court in such case shall be returned to the company, the object evidently being to vest in the court the power to adjudge payment to the land owner of the damages sustained by him from the entry. As entry is only authorized after the report of the commissioners is confirmed by the clerk and payment into court of the sum assessed, there could be no great amount of damages, if any, in excess of the sum adjudged by the commissioners and the clerk as the full value of the land, in the brief period pending an appeal to the judge. If, in an extraordinary case, it should appear that there is danger of damage to the land owner in excess of the sum assessed and paid in, it may be that the judge, in the exercise of his sound discretion, can order the company to file a bond to cover such possible excess, and upon failure of the company to comply with such order, restrain it from proceeding to enter; but it should be a very clear case to authorize the judge to require more than the statute. Certainly there can be no call for this court to interfere with the regular proceedings of the court below by prohibiting the clerk from appointing commissioners. The defendants have complained before they are hurt.

That no appeal lay at this stage, i. e., from the judge remanding the cause to the clerk, has been repeatedly adjudged: American Union Tel. Co. v. Wilmington etc. R. R. Co., 83 N. C. 420 (where the subject is fully discussed by Smith, C. J.); North Carolina etc. R. R. Co. v. Carolina Cent. R. R. Co., 83 N. C. 499; Commissioners v. Cook, 86 N. C. 19; Norfolk etc. R. R. Co. v. Warren, 92 N. C. 622 (where

it is said that the object of the statute is to expedite the construction of works of internal improvement by allowing them to [140] proceed upon payment into court of assessed damages without interruption by appeals, which in such cases lay only from the final judgment); Hendrick v. Carolina Cent. R. R. Co., 98 N. C. 431, 4 S. E. 184, which says: "They settle the course of practice in such proceedings and sufficiently state the reason for it."

But even if an appeal lay and the clerk had been proceeding unadvisedly, it does not follow that the court would intervene by this extraordinary writ: High on Extraordinary Remedies, secs. 767, 770, 771; 23 Am. & Eng. Ency. of Law, 2d ed., 207-211.

Prohibition on very similar facts to these was refused: Parker v. Snohomish Co., 25 Wash. 544, 66 Pac. 154; State v. Superior Court, 7 Wash. 74, 34 Pac. 431.

Petition denied.

The Writ of Prohibition is discussed in the monographic note to State v. Commissioners, 12 Am. Dec. 604-611. It is an extraordinary remedy, to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress: State v. Jones, 2 Wash. 662, 26 Am. St. Rep. 897, 27 Pac. 452; Walcott v. Wells, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367; Wilkes v. Stiles, 75 Vt. 42, post, p. 804.

ROBINSON v. McDOWELL.

[133 N. C. 182, 45 S. E. 545.]

LIMITATION OF ACTIONS.—Part Payment by an Assignee for the Benefit of Creditors, of a debt included in the assignment does not toll the running of the statute of limitations against such debt. (p. 706.)

LIMITATION OF ACTIONS—Assignment for Creditors.—If it is discretionary with the assignee for the benefit of creditors, as to the time of the sale of the property assigned, the power of the assignee to sell and apply the proceeds of the sale to the debts is not destroyed simply because the debts secured may be barred by the statute of limitations. (p. 706.)

LIMITATION OF ACTIONS—Assignment for Creditors—Sale of Homestead.—If the grantor in an assignment for the benefit of creditors retains his homestead, his assignee may, upon his death, sell the homestead to pay his debts, though such debts are barred by the statute of limitations. (p. 707.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—Parties—Special Proceedings.—If a grantor in an assignment for the benefit

of creditors dies, his personal representative and the assignee may join in a special proceeding to sell his land to pay debts. (p. 708.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—Sale of Land—Title of Purchaser.—If an assignee for the benefit of creditors and the administrator of the grantor in such assignment, join in a proceeding to sell his land, alleging that such grantor died seised of such land in fee, the title of the purchaser at the sale under such proceeding is not affected by such allegation. (p. 708.)

C. C. Lyon and J. D. Shaw, Jr., for the plaintiff.

R. S. White and E. K. Bryan, for the defendants.

183 MONTGOMERY, J. On the 16th of March, 1888, John A. McDowell, of Bladen county, executed a deed of trust to C. M. McLean for the benefit of his creditors. A large amount of both real and personal estate was conveyed in the deed, and the creditors were arranged in three classes, the third class embracing all of his creditors except those whose debts were first preferred and those in the second preferred class. Newton Robinson (the administrator of McDowell, who died in 1899, and one of the plaintiffs in this action) and Thomas J. Norman are creditors of the first class. In the preamble of the deed of trust it was declared that the grantor was indebted to various persons in divers amounts of money, which he was unable to pay, and that he was willing to assign all of his property for the benefit of his creditors. Then there followed a conveyance to the trustee of all the real estate and personal property "except such as is by law exempt from sale under the execution, to wit, his homestead and personal property exemptions." The homestead and personal property exemptions were assigned and allotted in December, 1889. There was evidence offered by the plaintiffs to show that in 1893 the grantor, having 184 become dissatisfied with the trustee, McLean, because he had sold one of the tracts of land embraced in the deed of trust for less than the grantor thought it was worth, agreed with the trustee McLean, and Robinson and Norman, that J. F. Melvin, who was then the clerk of the superior court of Bladen county, should be substituted as trustee in the place of McLean; that another deed of trust was drawn up and executed by McDowell and McLean (in which McLean conveyed all of his rights under the first deed); that the deed of 1893 embraced the same property conveyed in the first deed, except the tract which had been sold by McLean, and contained the same provisions contained in the deed of 1888; that the deed of 1893 was registered in the office of the regis-

ter of deeds of Bladen county, and the original registration and deed were both burned in a fire which consumed the courthouse. John A. McDowell died in January, 1899, the owner of other real estate than that conveyed in the deeds of trust, and Newton Robinson within a few days was qualified as his administrator.

The trust being unexecuted and the debts unpaid, the administrator, Robinson, filed a petition in the superior court of Bladen county (before the clerk) to sell the real estate of the intestate to make assets for the payment of his debts. McLean and Melvin joined in the petition for the purpose of conferring on the administrator the legal title to the real estate conveyed in the deed, and under the order of the court to have administered by the administrator the proceeds of the sale of the land conveyed in the deed in the payment of the debts of the intestate, according to the terms of the trust deed. The debts due to Robinson and secured in the deeds of trust consisted of three notes, two of them under seal and due in 1884, and one a simple promissory note due in 1885.

185 The only payments ever made upon the notes due by McDowell to Robinson were made by G. F. Melvin, the assignee in the deed of trust of 1893. The assignee was not authorized in the deed of trust by the grantor to make any promise to pay the balance of the debt upon any payment made by him or to revive the debt after the same might become barred by the statute of limitations. He was the agent of the grantor, according to the provisions of the deed of trust, to perform such duties as were imposed upon him in the deed, viz., to sell the property and apply the proceeds in the manner directed. A payment, therefore, by the assignee, did not have the effect of arresting the running of the statute of limitations against Robinson's debts: Battle v. Battle, 116 N. C. 161, 21 S. E. 177.

The statute of limitations having been pleaded by the defendant against the debts of Robinson, the jury properly found under the instructions of the court that those debts were barred. But that did not affect the security contained in the deed of trust for the payment of those debts. There was a provision in the deed under which the trustee was given discretion as to the time, place, manner and terms of the sale of the property embraced in the deed. And if that had not been so, if the deed had contained only a power of sale without limitation as to time of sale, the power of the trustee to sell and apply the proceeds of the sale to the debts would not be

destroyed, because the debts secured might be barred by the statute of limitations: Menzel v. Hinton, 132 N. C. 660, 95 Am. St. Rep. 647, 44 S. E. 385, and cases there cited. The property, therefore, conveyed in the deed of trust was, and is, a security for the debts, though they might be defeated by the plea of the statutory bar, so far as the personal liability of the debtor is concerned. There [186] was no error in that part of the judgment, therefore, which decreed that no part of the land of the intestate, other than that conveyed in the deed of trust, could be sold to pay the Robinson debts. His honor held, however, that the Robinson debts were barred by the statute of limitations as to the reversions in the homestead of the grantor, and in the judgment of the court it was adjudged that no part of the proceeds of the sale of the reversion in the homestead interest should be applied to the Robinson debts. When that judgment was rendered his honor followed the law as it had been declared by this court in Joyner v. Sugg, 131 N. C. 324, 42 S. E. 828; but since that time the case of Joyner v. Sugg has been reheard and the former judgment reversed. His honor simply followed our error, and in his ruling there was error, and the opinion of the court below on that point is reversed.

The homestead has fallen in by the death of the homesteader, and the tract of land will be sold, as if the homestead had never been allotted, and the Robinson debts will come in for their proper share of the proceeds.

Affirmed, except as to the reversal of that part of the judgment concerning the reversion of the homestead as above pointed out.

DEFENDANTS' APPEAL IN SAME CASE.

MONTGOMERY, J. The defendants insisted that the court below erred in not dismissing the action, because of a want of jurisdiction, that is, that because of the uniting of the trustees with the administrator in the petition to make real estate assets, the clerk did not have jurisdiction of the matter, and that therefore the superior court, on the case being sent to that court from the clerk for trial, did not have jurisdiction. In the case of Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518, and cases there cited, it is difficult to understand the exception [187] of the defendant to dismiss the action on the ground assigned. The defendants' exception to the uniting of the administrator and the trustees, McLean and Melvin, and to the introduction of the deeds of assignment as evidence in

the case, ought not to be sustained. We think it commendable that the trustees and the administrator should have jointly commenced this proceeding, for it is almost certain that time and expense have been saved, and that the property will sell for a better price under the direction and order of the court in this case than it would have brought if the administrator had sold the equity of redemption and the trustees or either one of them had sold the property under the deed of trust.

There is no merit in the ground taken in the defendants' brief that the deeds of trust and the rights of creditors under them were destroyed because of an allegation in the petition that the intestate was seised in fee simple of the lands described in the petition, embracing those conveyed in the deed, and an admission of that allegation by the defendants. The whole pleadings go to show that the deed of trust was to be respected in its provisions as to the application of the proceeds of the sale of the land conveyed therein, and the allegation that the fee simple title was in the intestate was simply made to show that the title to the property would be complete and the entire interest in the land would be conveyed under the order of sale prayed for by the petitioners. The defendants' contention is too highly technical for adoption.

From our point of view it makes no difference whether the deed of trust of 1893 was valid or not. Either that or the one of 1888 was valid, and the trustees named in both are parties to this proceeding. It appears from the defendants' statement of the case on appeal that both McLean and Melvin were parties plaintiff; but in the plaintiff's appeal McLean does not seem to be a party. If he is not, it will be well for the plaintiffs to bring him in by amendment. In the judgment [188] it appears that Newton Robinson is appointed a commissioner to sell the land for cash, etc. Before that sale is made the commissioner must be required to file a proper bond in a sum double the value of the property to be sold, conditioned for the faithful discharge of his duty in making the sale and in applying the proceeds. This must be done, that the creditors may feel as secure in the sale of the property by the court as if the sale had been made by one of their own choice.

No error.

As to Limitation of Actions in relation to assignments for the benefit of creditors, see McIlhenny Co. v. Todd, 71 Tex. 400, 10 Am. St. Rep. 753, 9 S. W. 445; In re St. Paul German Ins. Co., 58 Minn. 163, 49 Am. St. Rep. 497, 59 N. W. 996. It generally is held that

payment to a creditor of a dividend by an assignee in insolvency will not take the residue of the debt out of the operation of the statute of limitations as against the debtor: Richardson v. Thomas, 13 Gray, 381, 74 Am. Dec. 636; Merchants' etc. Bank v. Watson, 46 Pa. St. 310, 84 Am. Dec. 549; Whitney v. Chambers, 17 Neb. 70, 52 Am. Rep. 390, 22 N. W. 229, but see the note to this last case.

GREENLEAF v. PEOPLE'S BANK OF BUFFALO.

[133 N. C. 292, 45 S. E. 638.]

PROCESS—Service of on Nonresident While in State.—The managing officer of a nonresident corporation while in the state for the sole purpose of attending a judicial sale of land to which his corporation is a party is not exempt from service of summons in an action against such corporation. (pp. 710, 711.)

PROCESS—Service on Nonresident Attorney While in State.—A nonresident attorney at law while in the state representing his client in a matter pending in court is not exempt from service of summons. (p. 711.)

E. F. Aydlett, G. W. Ward and W. M. Bond, for the plaintiff.

Pruden & Pruden and Shepherd & Shepherd, for the defendants.

292 MONTGOMERY, J. Upon the motion to strike out the returns of the sheriff of service of process (summons) upon the defendants, the People's Bank of Buffalo and Norris Morey, the following are substantially the facts as found by his honor: In February, 1898, an action was begun in the United States circuit court for the eastern district of North Carolina, in which the East Coast Cedar Company was plaintiff and the People's Bank of Buffalo, New York, American Exchange Bank of Buffalo, New York, William A. 293 Ensign and Charles A. Ensign and Henry H. Persons and John R. Hazel, receivers, were defendants. The defendant Morey was one of counsel for the defendants, and A. D. Bissell was vice-president of the People's Bank. Under a decree for the sale of the real estate described in the pleadings the sale took place at Manteo, North Carolina, on the 12th of November, 1902. Service of the summons in the case before us was made personally upon Bissell by the sheriff of Dare county at the sale, Bissell being present at the sale and in the state, by the advice of counsel, and for no other purpose than to attend the sale. The summons was served upon the defendant Morey in an action for

debt in Wake county, North Carolina, on the 2d of January, 1903, at his hotel, while he was in attendance upon the United States circuit court for the purpose of representing his clients as their attorney in the matter of a notice made in the cause for the confirmation of a sale made by certain commissioners, and for the entry of a decree confirming the sale and directing title to be made to the purchasers in accordance with the practice of the United States courts. Both Bissell and Morey were at the times of the service of summons residents of New York State and had been for many years just preceding the service of the summons; Bissell having been in North Carolina at that time solely for the purpose of representing the People's Bank at the sale, and the defendant Morey solely for the purpose of attending the court as attorney for his clients in the case, and especially to attend to the matters embraced in the motion.

Upon motion of counsel in the court below, who made special appearances, his honor struck out the returns of the sheriffs of service of process (summons) upon Bissell and Morey, and it was adjudged by the court that the service be vacated and set aside.

As to the service made upon the defendant, the People's Bank, the question resolves itself into this form: Is service [234] of a summons an invalid service if made upon a managing officer of a nonresident corporation who is in this state for the sole purpose of attending a sale of land in which his corporation is interested, and the sale being made under a judicial decree of the circuit court of the United States in an action in which the foreign corporation was a party? The answer to the question depends upon whether or not the sale was such a matter as amounted to a judicial proceeding and rendered Bissell's presence equivalent to a constructive presence in the court. If so, his honor was correct in his judgment vacating the service of the summons on the People's Bank, for, in Cooper v. Wyman, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947, this court held that parties and witnesses who were nonresidents were exempted from the service of summons and other civil process from the time of their coming into this state, during their stay and a reasonable time for returning, and when they are here for no other purpose whatever. But we are of the opinion that the sale of the land, although made under a judicial decree, was not such a judicial proceeding as would exempt a party interested from service of civil process. Bissell was not before the court con-

structively; he was not attending the taking of depositions under order of the court, nor was he doing anything which could alter the decree of sale or affect in any manner the action of the commissioner who had been ordered to make the sale. That officer was directed by the court to do all that was to be done on the day of sale; that is, to make the sale and report the result back to the court. At that time the defendants would then have their day to make exceptions to the report, or to take any action concerning it which they might deem proper. We therefore think his honor was in error in setting aside and vacating the return of the sheriff of Dare of the service of the summons upon the People's Bank of Buffalo.

295 As to the service of the summons upon Morey, the attorney at law: The common rule on the question of service of process in civil actions upon attorneys is stated in 2 Taylor on Evidence, section 1330, in these words: "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of judicial proceeding, but, in common with parties, barristers, solicitors and, in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process while going to the place of trial, while attending there for the purposes of the cause and while returning home." In 3 Blackstone's Commentaries, *289, the rule is laid down thus: "Also clerks, attorneys and all other persons attending the courts of justice (for attorneys, being officers of the courts, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege), as being presumably present in court." We have no statute law in this state affording exemption to attorneys from the service of court process upon them, and, as we have seen, there was nothing at common law which exempted an attorney from being served with process in the nature of our summons. The service of the summons upon Morey was therefore regular and should not have been vacated and set aside by his honor.

The question does not arise in this case as to whether the common-law exemption, to its full extent of an attorney from arrest in a civil action prevails in this state, but we think an expression of opinion on the matter might not be out of place. The provision of the Code embraced in section 641 provides that

"all such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of or repugnant to or inconsistent [296] with the freedom and independence of this state and the form of government therein established and which has not been otherwise provided for, in whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this state." The matter of exemption from service of process in civil actions, as it prevailed at common law, has been the subject of revision by our statutory law, as will appear by reference to sections 1367 and 1735 of the Code. Section 1367 provides that witnesses shall be exempt from arrest in civil cases during their attendance at any court, and during the time such witnesses are going to and returning from the place of attendance; and section 1735 prohibits the sheriff or other officer from arresting under civil process any juror during his attendance on or going to and returning from any court of record. As we have said, we have no legislation on the subject of the exemption of attorneys from the service of process, but we think, under our institutions and because of obsoleteness by nonusage, the privilege ought not to be afforded to attorneys except when they are actually in attendance upon court in the due course of their employment as attorney.

In a very few states in the Union the courts have held that attorneys at law, while in attendance upon court, are exempted from the service of summons or other process not in arrest, but the reasoning upon which those decisions are based is not satisfactory to us. It must be borne in mind that the privilege of exemption from arrest afforded to attorneys while attending court is not so much for the benefit of the lawyers as it is for their client, and for the aid they give to the court as officers thereof in the due administration of justice.

There was error in the vacation and setting aside of the sheriff's return of the service of the summons upon Morey, the attorney.

Error.

[297] CLARK, C. J., concurring. The defendant Morey was served with summons in this case while at a hotel in this state. He contends that because he was a lawyer, resident in another state, and was attending court in this state as counsel in a cause therein pending, the service should be struck out. The proposition is a novel one in a land where equality before the law is the ruling principle and where

special privilege to any class of our citizens is not only not recognized by law but is prohibited by the constitution. A careful examination shows no ground for the alleged exemption of lawyers from service of summons. There is no precedent in England to sustain the proposition, and none in this country save a single case, a very recent one—Hoffman v. Circuit Judge, 113 Mich. 109, 67 Am. St. Rep. 458, 71 N. W. 480—which holds that a lawyer, resident in the same state, is privileged from service of a summons while attending the supreme court of the state or going or returning therefrom, but none of the authorities cited in that opinion sustain its conclusion. The reason given in the opinion is that while by statute in that state the prohibition of the arrest of counsel in a civil suit is restricted to the actual sitting of a court at which he is engaged, that this does not repeal the common-law exemption of counsel from service of summons. But, on the other hand, the most eminent lawyer which that state (Michigan) has produced, Judge Cooley, in a note to his work on Constitutional Limitations, fifth edition, page 161, says: "Exemption from arrest is not violated by the service of citation or declaration in civil cases." Besides, there was at common law no exemption of lawyers from service of process other than arrest, and the reason for the latter was that it would be an injury to clients whose cause had been prepared for trial by such counsel to suddenly deprive them of his services, but service of a summons does not have that effect.

[206] In Robbins v. Lincoln, 27 Fed. 342 (United States circuit court for Illinois), it is well said: "Inasmuch as resident attorneys may be served with summons while in attendance upon court, an attorney from another state has no greater privilege." This is exactly in point here. It is well known that no lawyer in this state has ever in its history been privileged, or contended even that he was privileged, from service of summons while attending court. If he were as the constitution, article 4, section 22, now provides that "the courts are always open," no lawyer or judge could ever be served with summons. In England, Blackstone says (3 Blackstone's Commentaries, 289) that lawyers could not be arrested on civil process while in attendance upon courts, but could be served with a bill, without arrest, which was equivalent to service of a summons. The same is stated in 8 Bacon's Abridgment, "Privilege" B, with the modification that if an attorney is sued with another (as in this case) "he is not privileged from arrest,

even though it is during his attendance in court," the evident reason being to prevent class discrimination. The exemption of lawyers from arrest, it seems has now been repealed in England. In this state the English privilege of exemption of lawyers from arrest has never been recognized. It is well known that one of the most distinguished lawyers and judges of this state, whose portrait now hangs on the walls of this chamber, was arrested and imprisoned for debt, and long prevented from attending upon court. This barbarous proceeding of imprisonment for debt, handed down from the common law, should have been repealed long before it was, but while it was in force our predecessors applied it impartially, and the bench did not hold their own members or their profession exempt. There was not at common law, and has not been in this state, any exemption of any one from service of summons, and the exemption from arrest under our statute is conferred only upon witnesses and jurors: Code, secs. [209] 1367, 1735. And even witnesses and jurors are not exempted from service of summons, since such service would not deprive the court of their presence. There is no reason why lawyers should be privileged from either arrest or service of summons any more than other officers of the court, as sheriffs, clerks, criers and the like, and the legislative power has therefore seen fit to make the exemption apply only to witnesses and jurors, and, as to them, to make the exemption extend to freedom from arrest only.

As to nonresidents, in Cooper v. Wyman, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947, this court held that nonresident witnesses and suitors coming into this state solely for the purpose of litigation were exempt from service while here for that purpose only. This was put upon the ground of necessity, because the state could not compel their presence, and that since no one else could fill their functions it was in the interest of justice to give them "a safe conduct." But this reasoning has not obtained in some states, notably Illinois, which holds that neither are exempt from service of summons: Greer v. Young, 120 Ill. 184, 11 N. E. 167, citing authorities. In Nichols v. Goodheart, 5 Ill. App. 574, it was held that a defendant involuntarily in the state, by virtue of criminal process, is not exempt from service of summons, citing Williams v. Bacon, 10 Wend. (N. Y.) 636. Other states hold that the rule is restricted to witnesses only: Shearman v. Gunlatch, 37 Minn. 118, 33 N. W. 549. Other states extend the exemption to parties also, since they have become competent as witnesses

(Mitchell v. Huron, 53 Mich. 541, 19 N. W. 176), and our state has adopted that rule, but restricts the exemption to those two—"nonresident witnesses and parties." An exhaustive brief of all the authorities, showing that the privilege extends only to nonresident witnesses and parties, will be found in the notes (eighteen pages) to Mullen v. Sanborn, 25 L. R. A. 721-738. No court whatever has in any case extended the exemption to nonresident lawyers. The nearest [300] approach to it is Central Trust Co. v. Milwaukee St. Ry. Co., 74 Fed. 442, in which a subpoena served upon nonresident counsel, which prevented his returning home and attending to business he had left unprovided for, was set aside. That case is not sustained by any previous authority, and evidently rests more upon the ground stated therein, that the nonresident subpoenaed was president of a railway company, than because he was also a lawyer, but, if sound, it is very far from sustaining an alleged exemption from service of summons, which did not prevent Morey from returning home and adjusting his business, for the trial of his case is for a subsequent term.

The United States constitution, article 1, section 6, prohibits the arrest of a member of the House of Representatives or a senator during the session, except for treason, felony and breach of the peace. There is a similar provision as to the members of the legislature in Nebraska. The numerous and uniform authorities that such privilege from arrest does not exempt from service of process without arrest are collected in a very recent and able opinion (1903) in Berlet v. Weary (Neb.), 93 N. W. 238, 60 L. R. A. 609; and in Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632; Gentry v. Griffith, 27 Tex. 461. For a stronger reason this is so where, as in most states as well as in this, lawyers are not exempt even from arrest. In Lyall v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8616, a service of a summons from a United States court upon a judge of the state supreme court, in his own court and while actually on duty, was set aside because being a supposed indignity to the court and interference with its business. Even if this can be sustained and extended to counsel, neither the dignity of the court nor the despatch of business in this case could be interfered with by the service of summons upon Morey at the hotel.

Nor, in the nature of things, is there any reason why a nonresident lawyer, coming here for a consideration in the [301] pursuit of his profession, should be exempt from the service of summons any more than a nonresident physician or minister

or a member of any other calling. The plaintiff sues for services rendered to the defendants in this state at their request. If Morey is exempt from service because here in the exercise of his profession, a "commercial tourist" is by the same right exempt from being served with summons in an action for a hotel bill incurred while prosecuting his calling. Indeed, his ground for exemption would be more plausible, for he is engaged in interstate commerce and the lawyer is not. Service of summons upon neither will interfere with the dignity of the courts or their despatch of business. Our state extends no preference to nonresident lawyers over those living here: Code, secs. 18, 19; Manning v. Roanoke etc. R. R. Co., 122 N. C. 828, 28 S. E. 963.

As far back as 1769 (10 George III, c. 50) England passed a statute confirming the ruling of Sir Orlando Bridgeman in Benyon v. Evelyn, Tr., 14 Car. II, C. B. Roll, over a century before (1661), and cited in Knowles' Case, 12 Mod., at page 64 (1694), that the privilege which members of Parliament enjoyed of being exempt from arrest did not exempt them from being sued or from service of ordinary process without arrest. The privilege was deemed too invidious a class privilege even for that age and country, and the claim was denied by Parliament itself and the contention put at rest: Cassidey v. Stewart, 2 Man. & G. 437. It is not for an American court to reverse the process and hold that because lawyers were formerly privileged from arrest during attendance upon court, therefore they are exempt from being sued and being served with a summons. By the census of 1900 there were one hundred and fourteen thousand seven hundred and three practicing lawyers in the United States, of whom twelve hundred and sixty-three were in North Carolina. If, during all these years, lawyers had possessed the privilege of exemption from the service of summons, assuredly more than one case could be [302] found to assert it. If it had been so asserted it would have been promptly repealed by statute, seeing that the Parliament in England passed an act denying a similar claim that its own members were exempt from service of summons because privileged from arrest, and that members and senators in Congress are not privileged from service of summons, though expressly exempted from arrest on civil process by the constitution. Even the former privilege of lawyers from arrest has been modified in some states and expressly repealed in others, and in others still, as in North Carolina, it has never been recognized or acknowledged.

Equally unfounded is the claim that service upon the other defendant, the officer of a corporation (Jester v. Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447), was invalid because made when he was attending a sale of land under a decree of court. Such sale may, like other acts, come before a court for review, but the sale itself is not a judicial proceeding, and no exemption from service of process extends to it. Such exemptions are restricted to nonresident witnesses and parties, and are permitted, not on their own account or for their own benefit, but for the benefit of the court in obtaining evidence at a trial, when the court cannot compel the presence of those who can testify to facts in issue in the litigation. This can have no application to the attendance of a party at a sale, under a decree in the cause, for his own convenience or benefit.

In the days of Privilege, under the rule of ecclesiastics in England, they held their own profession exempt from the jurisdiction of the civil courts, and set apart certain places where all men were exempt from service of process under the "Privilege of Sanctuary." The last remnant of such class privileges was repealed: 21 James I. Judges have never claimed for the legal profession or the courts any similar exemption, either as to persons or places. With lawyers for judges, justice knows neither class nor caste, and admits no [303] special privileges, and for its administration "every place is a temple and all seasons summer."

The judgment setting aside the service of summons must be reversed.

Douglas, J., concurs in the above concurring opinion.

Service of Process on nonresidents is discussed in Guynn v. McDonald, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74; Thomas v. Thomas, 96 Me. 23, 90 Am. St. Rep. 342, 52 Atl. 642; Hinton v. Penn Mut. Life Ins. Co., 126 N. C. 18, 78 Am. St. Rep. 636, 35 S. E. 182; monographic note to Worth v. Norton, 76 Am. St. Rep. 536-542. As to the exemption of lawyers from service while attending court, see page 535 of this note. Service upon an agent of a foreign corporation while he is temporarily in the state is discussed in the monographic note to Abbeville Elec. etc. Co. v. Western Elec. etc. Co., 85 Am. St. Rep. 910-913, on jurisdiction of foreign corporations.

PARISH v. EAST COAST CEDAR COMPANY.

[133 N. C. 478, 45 S. E. 768.]

CONSTITUTIONAL LAW—Due Process of Law.—The object and meaning of the phrase, "due process of law," is to secure to everyone the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to have an opportunity to defend, protect, and enforce such rights in an orderly proceeding adapted to the nature of the case. The essential elements of due process of law are notice and an opportunity to defend. (p. 723.)

CONSTITUTIONAL LAW—Due Process of Law.—A statute providing that if the owner of land, his heirs or assigns, shall fail to pay all arrearages of taxes levied thereon, or which ought to have been levied before a certain date, such land shall be forfeited to and vest in the state without judicial proceeding, is unconstitutional and void as depriving the owner of his property without due process of law. (p. 724.)

Shepherd & Shepherd and W. M. Bond, for the plaintiff.

E. F. Aydlett and F. H. Busbee, for the defendant.

479 DOUGLAS, J. In this cause, a jury trial being waived, the following facts are found by the court:

"1. Before the bringing of this action the state board of education, for value, executed and delivered to plaintiff a deed conveying in fee simple to plaintiff the tract of land described in the complaint, said deed being properly probated and registered before this action was started in the county in which said land is situated.

"2. That all of said land is swamp land, containing more than two thousand acres in that body, and plaintiff has no source of title to it except by virtue of said deed.

"3. That after plaintiff procured said deed, before the suit was started, defendants entered upon said land and cut and removed therefrom timber trees worth ——— dollars, under deed purchased by defendant before said board made deed to plaintiff.

"4. That about one hundred years ago said land was granted by the state to one Hunnings, which grant was registered in the county said land was in as soon as same was issued.

"5. That the taxes for several years before and up to and including the year 1891 have never been paid to the state upon said lands. Defendant owns whatever title the heirs of said Hunnings had at the time their deed was made to defendant.

"6. That said board of education had never had said land

surveyed nor exercised any control over it before making said deed to plaintiff.

"Defendants admit that plaintiff owns said land if said [480] deed was sufficient to convey the title—that is, if said board of education owned said land, under the Code, volume 2, chapter 15, and laws amending same, then plaintiff was owner of same at the time defendants cut timber from same.

"Plaintiff admits that defendants own said land if said deed to plaintiff did not in law convey a good title to plaintiff." Upon this state of facts the court below adjudged that the defendants were the owners of the land in question.

The single question presented for our consideration is the constitutionality of chapter 243 of the Laws of 1889, amending section 2522 of the Code. Section 2522, before the amendment, was as follows: "Any person, his heirs or assigns, having at any time obtained a grant from the state for any swamp lands which have been surveyed or taken possession of by the state board of education or their agents, and shall not have regularly listed the same for taxation and paid the taxes due thereon to the persons entitled to receive the same, such grantee and his heirs or assigns shall forfeit and lose all right, title and interest in the said swamp lands, and the same shall ipso facto revert to the state and be vested in the said board upon the same trusts as they hold other swamp lands, unless such person, his heirs or assigns shall have paid to the sheriff of the county in which said lands lie, prior to the twenty-first day of January, one thousand eight hundred and forty-four, all the arrearages of taxes due on said land, with interest thereon, from the time the taxes ought to have been paid."

The part of the amending act necessary for our present consideration is as follows: "Upon the failure of any such grantee or grantees, their heirs or assigns, to pay to the sheriff or other person authorized to receive the same all arrearages of taxes which were levied and assessed, or *which ought to have been levied and assessed*, with lawful interest due thereon, on or before the said twenty-first day of January, 1890, all [481] the right, title and interest in said swamp land belonging to or vested in such grantee or grantees, their heirs or assigns shall become forfeited and vested in the state board of education; and no suit, action, proceeding, order, decree or judicial determination shall be necessary to such forfeiture, but it shall be absolute at the expiration of the time herein prescribed, upon the nonpayment of the aforesaid taxes and interest." The

italics are ours. This act is apparently intended, at least by the draftsman, to evade the construction placed upon the old act by the cases of Phelps v. Chesson, 34 N. C. 194, and Eastern Land etc. Co. v. State Board of Education, 101 N. C. 35, 7 S. E. 573. In the former case this court held that, although the act provided that the lands should "ipso facto revert to and be vested in the state," unless all arrearages of taxes were paid within twelve months of the passage of the act, the said lands were not forfeited in the absence of any procedure to declare and enforce forfeiture. The court, by Pearson, J., says: "Admit that this act has the force of inserting in the original grant a condition that if the taxes are not paid when due, but shall at any time be in arrear, 'the land shall ipso facto revert to and be vested in the state,' according to the well-settled principles of law if the taxes were in arrear at any time the estate created by the grant would not be defeated and revert to the grantor unless some solemn act was done by which to enforce the condition; for the estate, having commenced by a solemn act, viz., a grant, must be defeated by an act equally solemn, upon the maxim of the common law, 'Eo ligamine quo ligatur.' If a feudal tenant failed to perform the services his estate was not defeated until the lord had judgment in a writ of cessavit. If a subject incurs a forfeiture by committing treason his estate is not defeated until 'office found.' If a feoffment is made on condition, and the condition is broken, the estate continues until it is [482] defeated by the entry of the feoffor or his heirs: Coke on Littleton, chapter on Conditions. The lawbooks teem with cases fixing the principle that an estate once vested cannot be defeated by a condition or forfeiture without some act on the part of the grantor or his heirs by which to take advantage of the condition or forfeiture, even when the words of the condition are 'the estate shall therefore be void and of no effect,' which words have the same legal import as 'ipso facto void.'"

The court expressly declined to pass upon the constitutionality of the act on the ground that it became unnecessary in view of the construction placed upon it. In Eastern Land etc. Co. v. State Board of Education, 101 N. C. 35, 7 S. E. 573, the court, in approving the interpretation placed upon the statute in Phelps' case, says: "The counsel for the appellant seems to question the correctness of that interpretation. We think it is reasonable and just, and it seems to us fully warranted, certainly by the spirit and reason of the statute. It is not to be

presumed or merely inferred that the legislature intended to deprive the grantee of his estate without affording him opportunity in some affirmative way that actively puts him on notice to defend his right if he shall see fit, and an intention to do so could only appear by clear and explicit terms, leaving no doubt as to such intent, and we forbear to say here whether such an enactment would or would not be of force for any purpose. The reasonable inference is that the legislature intended to allow such opportunity, and it sufficiently appears that it has done so."

The court again declines to pass upon the constitutionality of the statute in the following significant words: "We forbear to say here whether such an enactment would or would not be of force for any purpose."

The present statute is so framed as to require an explicit adjudication of its constitutionality. Courts naturally and 483 properly avoid passing upon the constitutionality of an act of the law-making power if substantial justice can be attained in any other way; but in the face of an imperative duty we are forced to declare it unconstitutional, as being not only in violation of the express provisions of that instrument, but subversive of natural and antecedent rights which the constitution itself was adopted to protect. It is clear to us that in Phelps v. Chesson, 34 N. C. 194, and Eastern Land etc. Co. v. State Board of Education, 101 N. C. 35, 7 S. E. 573, this court construed the words "ipso facto" in the manner it did as the only constitutional construction of which the act would permit. The very fact that the court declines to express any opinion as to the constitutionality of an act, and then proceeds to place upon the act a construction that renders it practically harmless, is a very strong intimation of its unconstitutionality when construed in any other manner. Thus, while those cases are not direct authorities for our decision in the case at bar, they are strongly persuasive in their tendency. The constitution of this state, in article 1, section 17, says that "No person ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." Section 1 of the fourteenth amendment to the constitution of the United States contains the following provision: "Nor shall any state deprive any person of life, liberty or property without due process of law." We refer to the federal constitution only by way of analogy, as we base our

decision in the case at bar exclusively upon the provisions of the constitution of this state.

It is well settled that the phrases "due process of law" and "the law of the land" mean identically the same thing, and the authorities on each are cited interchangeably. The latter expression is taken from section 39 of Magna Charta, which is repeated in chapter 29 of the Charter of Henry III [484] confirmed by Edward I. It is difficult to define what is due process of law, but perhaps the definition most largely quoted is that of Mr. Webster in his argument in the Dartmouth College Cases, which is as follows: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." Mr. Webster, after giving the above definition, continues as follows: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country." It is significant that he includes "acts of confiscation" and "legislative forfeitures" among the intolerable evils to be avoided. The result of the best modern authorities is well stated in 10 American and English Encyclopedia of Law, second edition, as follows: "Though all the preceding definitions throw much light on the meaning of due process of law, the most satisfactory definition is that it secures to everyone the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to be afforded an opportunity to defend, [485] protect and enforce such rights in an orderly proceeding adapted to the nature of the case."

In Henderson v. Wickham, 92 U. S. 259, the court says: "In whatever language the statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect." Again, the court says, in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 836: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights are denied we are governed by the substance of things and not by mere form." It is useless to cite further authorities as to what is due process of law, when the act itself specifically provides that no process whatever shall be necessary. It expressly provides that: "No suit, action, proceeding, order, decree or judicial determination shall be necessary to such forfeiture."

The act contains another most singular provision, which of itself would be fatal to its validity were there no other objections. It provides that this forfeiture of the land shall become absolute upon the failure to pay not only such taxes as were actually levied but also all those "which ought to have been levied and assessed." Whether the legislature could pass a valid act providing for the forfeiture of land for nonpayment of taxes thereafter lawfully levied is a question not before us and on which it would be useless to express an opinion. It must be borne in mind that this act does not pretend to provide for the collection of back taxes, but imposes a forfeiture for the failure to pay back taxes. The principles are essentially different. The first simply provides for the collection of the debt, while the other is in effect a confiscation of the property for an antecedent omission of duty. Let us see what would be the practical operation of the act if enforced. There is no limitation as to how far back the act will operate, as it provides that the land shall be forfeited unless all arrearages of taxes are paid. This would apparently [486] take it back to the date of the grant, which in the case at bar was issued about one hundred years ago. If the taxes for 1804 had not been paid the land would have become absolutely forfeited to and vested in the state board of education on the first day of January, 1890, in spite of the fact that the taxes for all the other eighty-seven years might have been paid in full. The owner, who might have been in actual possession personally and through those under whom he claimed for a hundred years and may have paid all subsequent taxes, would be utterly helpless, as no statute of limitation would have had time to run against the state since 1890. He would be at the mercy of the board

of education, or perhaps even worse than that if, forsooth, some neighbor who coveted his little vineyard had obtained a deed for his land, or even an option thereon.

Of course we must take the act as we find it, and declare it unconstitutional upon its face, but we cannot do the legislature the injustice of supposing that it ever intended to legalize such unjust possibilities by an act passed in the closing days of its session.

Our attention has been called to the case of State v. Sponangle, 45 W. Va. 415, 32 S. E. 283. We have carefully examined that case, in which there is a learned and elaborate opinion by a distinguished jurist. We think there is a substantial difference between the statutes; but, in any event, wherein that opinion differs from the views herein expressed it fails to meet our approval. The distinction between a forfeiture and a sale for taxes must be borne in mind, as they are essentially different in nature and result. A sale is the collection of a debt, is public, is made only after notice, and passes no title until the deed is made, of which the owner must have additional notice. In the meantime he can pay his taxes and keep his land. On the contrary, a forfeiture works [487] secretly and immediately, without notice to the owner and without opportunity of redemption.

Judgment affirmed.

Due Process of Law means a course of legal proceedings according to rules and principles under an established system of jurisprudence for the protection and enforcement of private rights, requiring a court of competent jurisdiction to pass upon the subject matter of the proceedings and a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated: Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9. See, too, Burdick v. People, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948; State v. Billings, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794. Administration upon the estate of a living person is a deprivation of property without due course of law: Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9. Compare Cunnis v. Reading School Dist., 206 Pa. St. 469, post, p. 790, 56 Atl. 16. So is the requiring of railroad companies of free transportation to shippers of livestock: Atchison etc. Ry. Co. v. Campbell, 61 Kan. 439, 78 Am. St. Rep. 328, 59 Pac. 1051. But the Torrens system of registering land titles does not take property without due process of law: State v. Westfall, 85 Minn. 437, 89 Am. St. Rep. 571, 89 N. W. 175; nor do proceedings against unknown owners generally, which are authorized by statute: See the monographic note to McClymond v. Noble, 87 Am. St. Rep. 358-368. See page 367 of this note for the enforcement of taxes against unknown owners.

HARTNESS v. PHARR.

[133 N. C. 566, 45 S. E. 901.]

CONFLICT OF LAWS—Recovery for Death by Wrongful Act—Method of Distribution.—If a resident of one state is killed in another state by wrongful act and his administrator appointed therein, sues and recovers there for such death, the fund thus recovered must be distributed according to the law of that state, although a prior administration on the estate of the deceased has been taken out in the state of his residence or domicile. (p. 730.)

Jones & Tillett, for the plaintiff.

W. F. Harding, for the defendants.

566 WALKER, J. This is an action brought by the plaintiff to recover a sum of money now in the hands of the defendant Pharr as administrator of D. W. Hartness. The administrator brought a suit in the superior court of Mecklenberg county against the Atlanta and Charlotte Air Line Railway Company and the North Carolina Railroad Company to recover damages for the alleged negligent killing of his intestate, under our statute, the Code, section 1498, and in that suit a verdict and judgment were rendered in his favor for eight thousand five hundred dollars. The amount of the judgment, with interest thereon, one hundred and seventy dollars, was afterward paid to him, and there now remains in his hands, after deducting the costs and expenses of administration, the sum of five thousand and seventy-one dollars and twenty-five cents, less the sum of seventy-five dollars already paid to the plaintiff on his share of the recovery, which balance 567 will be further reduced by the amount of the costs and expenses of this action to be paid therefrom.

The plaintiff is the father of D. W. Hartness, the intestate of the defendant Pharr, and the defendants, other than the administrator, are the brothers and sisters of the intestate. It further appears that the intestate was killed in this state, and at the time of his death he and his father and his brothers and sisters were all residents of South Carolina and domiciled in that state. The latter were made parties because they claimed an interest in the fund adverse to the plaintiff.

The plaintiff duly qualified as administrator of D. W. Hartness in South Carolina, and afterward the defendant Pharr qualified as administrator in this state for the purpose, it is

stated in the case, of bringing said suit to recover damages for the negligent killing of his intestate.

The case was heard in the court below upon the complaint, answers of the defendant and a demurrer to the answers, and the foregoing facts are taken from the pleadings, the allegations of the complaint having been admitted and the demurrer filed to the special matters set up by way of defense. The defendants annexed a copy of the statute of South Carolina concerning the distribution of intestates' estates, which is as follows: "Section 2468. If the intestate shall leave no child or other lineal descendant, but shall leave a widow, and a father or mother, and brothers and sisters or brother or sister, of the whole blood, the estate, real and personal, of such intestate shall be distributed in the following manner, that is to say, the widow be entitled to one moiety thereof, and the other moiety shall be equally divided among the father, or if he be dead, the mother and the children of the whole blood, so that such father or mother, as the case may be, and each brother and sister, shall receive an equal share thereof. The children of a deceased brother or sister, of the whole blood, to take among them the share to which [568] their parents would have been entitled had such parent survived intestate; provided, that there be no representation admitted among collaterals after brother and sister's children. If the intestate shall leave no widow the provision made for her shall go as the rest of the estate is directed to be distributed in the respective clauses in which the widow is provided for."

The plaintiff contends that under the facts of the case the distribution should be made according to the laws of this state, and that, therefore, he is entitled to the whole fund as the sole distributee or next of kin of the intestate.

The defendants, on the contrary, insist that the fund should be administered or distributed under the laws of South Carolina, and that if this is done the plaintiff will be entitled to one-tenth only, or a child's share, and the balance will go to the defendants, who are the brothers and sisters of the intestate. The exact contention of the defendants, as we understand it, is as follows:

1. The defendant Pharr having qualified as administrator in North Carolina subsequent to the appointment and qualification of the plaintiff as administrator in South Carolina, his administration is ancillary to the plaintiff's administration in the latter state, and it is the duty of the defendant Pharr to

pay over to the plaintiff, as the original administrator of the deceased, the funds in his hands in order that the original administrator may complete his administration according to the laws of South Carolina, wherein the deceased had his residence at the time of his death. This having been done, the fund once reaching the hands of the South Carolina administrator would be distributed among the next of kin according to the laws of that state, and the rights of the parties would be protected.

2. The other view the defendants present is that if the defendant Pharr, administrator, must distribute the funds [569] in his hands among the next of kin and thus close his administration, the fund should be distributed as would other personal property in case of intestacy (Code, sec. 1500); that is, according to the laws of the state wherein the deceased had his residence and domicile at the time of his death.

As between these two opposite claims, we are with the plaintiff, because we believe that upon principle and authority he is entitled to receive the entire fund from the defendant Pharr, subject, of course, to such proper deductions as the law makes in favor of the administrator for costs and expenses, or on account of any payment heretofore made to the plaintiff out of any money in his hands.

It must be admitted that at common law no action would lie to recover damages for the death of a person, though caused by the negligent or other wrongful act of another and the cause of action upon which a recovery was had in a suit against the railroad companies by Pharr, administrator, was not, therefore, known to the common law, and is solely a creature of statute. The first innovation upon or amendment of the common law, in this respect, was brought about by the enactment of 9 and 10 Victoria, chapter 93, commonly called Lord Campbell's Act, because he was its author, and it was mainly through his efforts that it was adopted. It was but one among the many wise and humane reforms of the law attributed to that eminent jurist, who enjoyed the rare distinction and honor of having successively been chief justice and chancellor of England. By that statute it is provided that the action shall be for the benefit of the wife, husband, parent and child of the person whose death is caused by the wrongful act, neglect or default of another, and shall be brought by and in the name of the executor or administrator of the person deceased, and the jury are authorized to give such damages as they may think proportioned to the [570] injury resulting from the death to the parties respectively,

for whom and for whose benefit such action shall be brought, the amount to be divided among the parties in such shares, as the jury by their verdict shall find and direct; and by amendment (27 & 28 Vict., c. 95) it was provided that if the personal representative did not bring the action within six months after the death occurred, the parties for whose benefit the action was given might themselves bring the same.

The provisions of that act in their essential features have become part of the statute law of nearly all, if not all, of the states, the principal difference between Lord Campbell's Act and the statutes of this country consisting in the method of bringing the action, the designation of the benficiaries and of the person or persons in whose name the action shall be brought.

It must be borne in mind that whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through or under him, and this is so although the personal representative may be designated as the person to bring the action: Baker v. Raleigh etc. R. R. Co., 91 N. C. 308. The latter does not derive any right, title or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative, he may perhaps be liable on his bond for its proper administration: Baker v. Raleigh etc. R. R. Co., 91 N. C. 308.

In further elucidation of the question involved in this case, it is well to consider that the cause of action given by the statute is not only one which originates at the death of the [571] intestate and is by no means a part of the assets of his estate, but that it exists in this particular case only by virtue of a statute of this state, and it arose in this state, as the death occurred here. The legislature, having created the right to sue for damages in such a case, had the power to annex to it any condition or impose any restriction upon it, including the power to declare how and in what manner the right should be enjoyed. Indeed, the mode of distribution is made an integral part of the cause of action, and cannot, in the nature of the case, be separated from it. This view has been taken by this court when construing another provision of the statute in re-

gard to the time, one year after the death, within which the action must be brought. In Taylor v. Cranberry Iron etc. Co., 94 N. C. 526, referring to that provision limiting the time for suing, the court says: "The state gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it." In Best v. Kinston, 106 N. C. 206, 10 S. E. 997, it is said that the action could not be brought at common law and is only entertained by the courts under the provisions of the Code, which embraces the principal features of the English statute, and that the right of action does not vest until the death, which is itself the cause of action.

The legislature had the power to prescribe the conditions upon which the right should exist, and it must be equally true that it had the power to declare how and in what way the right should be enjoyed, and this it did by section 1500, by which it is provided that "the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in the case of intestacy." The direction in that section is explicit that the [572] amount of the recovery shall be disposed of as provided in chapter 33 for the distribution of personal property of intestates, and this provision is made in section 1478 of the Code, which gives the fund to the father, under the facts of this case, he being the next of kin of the intestate. The legislature might have said, perhaps, that it should go in the way provided by the statute of the state of South Carolina or the place of the intestate's residence and domicile. It did not so declare, but, naturally and reasonably enough, provided that its own laws should govern in the distribution of the money, the suit not being one brought under the statute of South Carolina, but under the statute of this state, the cause of action having arisen here.

The views that we have expressed and the conclusion reached, that the fund must be paid out by the administrator according to our statute, is sustained by the highest authority. One of the leading cases upon the subject is Dennick v. Railroad Co., 103 U. S. 11, in which case it appeared that the death was caused in New Jersey by the negligence of the defendant, who was sued in New York, by an administrator appointed there, for the damages sustained, and it was held that the fund recovered in the action should be distributed in accordance with the statute

of New Jersey, under which the action was brought, the cause of action having arisen in that state. The case of McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482, was like the case at bar in all its essential facts, the only difference between the two cases being that in that case the death occurred in Illinois and the action was brought in Kentucky, and that difference, it must be admitted, strengthens it as an authority in this case, where the death occurred and the cause of action arose and the suit was brought in the same state. It was held in that case that, though the suit could be brought and the recovery had by an administrator appointed in Kentucky, the amount recovered [573] should be paid to the persons entitled to receive the same under the statute of Illinois.

It is our opinion, therefore, and we so decide, as it is clearly established both by reason and authority, that the fund received in such actions must be distributed to the persons who are designated as the beneficiaries thereof by the statute of the place where the cause of action arose, and this is so even if the cause of action arose in one state and the suit is brought in another, for in such case the recovery must always be to the same uses as would be a recovery in a suit brought in the state where the cause of action originated: Nelson v. Chesapeake etc. R. R. Co., 88 Va. 971, 14 S. E. 838; Morris v. Chicago etc. R. R. Co., 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143; In re Degamore, 86 Hun, 390, 33 N. Y. Supp. 502; Stoeckman v. Terre Haute etc. R. R. Co., 15 Mo. App. 503; Fable v. Cleveland etc. R. R. Co., 30 Ind. App. 268, 65 N. E. 929; Florida etc. R. R. Co. v. Sullivan, 120 Fed. 799.

The administration of the defendant Pharr is not ancillary to that of the administration in South Carolina, so far as the fund now in his hands which was recovered from the railroad companies is concerned. In no possible view, as we have said, can this fund be regarded as a part of the assets of the estate of the deceased. The cause of action never accrued to him and never came into existence until his death, and the recovery thereon cannot be considered or treated as any part of his estate. The doctrine that the succession to personal property is determined by the law of the intestate's domicile, as laid down in Leak v. Gilchrist, 13 N. C. 75, which was cited in the brief of the defendant's counsel in support of his position, has no application to this case. The personal representative in South Carolina in right of the next of kin succeeded to no property, because his intestate died leaving none, unless he had

effects other than the money now claimed as a part of his estate. To require the defendant [574] Pharr to pay the money to the South Carolina administrator would be in direct contravention of our statute.

The fund, subject to the deductions already mentioned, must be paid to the plaintiff, who is entitled to receive it as the sole next of kin of the intestate, to the exclusion of the defendants. There was no error in the ruling of the court below.

Judgment affirmed.

Conflict of Law in respect to damages for wrongful death is discussed in the monographic notes to Gray v. Telegraph Co., 91 Am. St. Rep. 726-729; Attrill v. Huntington, 14 Am. St. Rep. 353-355; and the recent case of McGinnis v. Missouri Car etc. Co., 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553, and cases cited in the cross-reference note thereto. In the event of a recovery in one state for the negligent destruction of life in another, pursuant to a statute of the latter, it is held that the sum recovered must be distributed according to the law of the latter state, where the cause of action arose: McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482.

STATE v. BIGGS.

[133 N. C. 729, 46 S. E. 401.]

CONSTITUTIONAL LAW—Practice of Medicine.—A statute designating who are eligible to "practice medicine or surgery," and providing that the expression shall mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever, excepting only midwives, nurses, and persons who minister to or cure the sick or suffering by prayer, is unconstitutional as an attempt to confer a monopoly on the method of the treatment of disease by doctors of medicine and surgeons. (p. 735.)

POLICE POWER—Practice of Medicine.—Persons have a right to use methods of treatment for disease or suffering requiring less skill and learning by the practitioner, than is required to constitute a doctor of medicine or a surgeon, and no legitimate exercise of the police power warrants a deprivation of such right. (p. 738.)

PHYSICIANS AND SURGEONS.—Osteopathy—License.—One who holds himself out as curing disease by a system of drugless healing without medicine or prescription, but by administering massage, baths and physical culture, a manipulation of the muscles, bones, spine and solar plexus, a kneading of the muscles with the fingers of the hand, and by advising his patients as to diet, and who charges and receives fees therefor and has no license, is not guilty of practicing medicine or surgery without a license. There is nothing in

such treatment calling for an exercise of the police power, and such practitioner cannot be punished under a law passed by virtue of the police power prohibiting such treatment by unlicensed persons. (p. 738.)

R. D. Gilmer, attorney general, for the state.

C. M. Stedman and E. J. Justice, for the defendant.

[729] CLARK, C. J. The defendant is indicted on a charge that he "did unlawfully and willfully begin, engage in and continue the practice of medicine and surgery and the branches thereof for fee or reward, without having obtained a license so to do from the board of medical examiners of the state of North Carolina." Upon the facts found the court was of the opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

[730] The special verdict found that the defendant advertised himself as a "nonmedical physician"; that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith"; that he advertises to cure by "natural methods," without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage, baths and physical culture, manipulates the muscles, bones, spine and solar plexus, and kneads the muscles with the fingers of the hand. He writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the state medical board, and claims no exemption under the provisions of the act of 1903, as a nurse or midwife, nor as one curing by prayer, and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment and received payment therefor since the passage of chapter 697 of the Laws of 1903, "To define the practice of medicine and surgery."

Section 3124 of the Code requires that every person who applies for license to practice "medicine or surgery or any of the branches thereof," shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine." There was added by chapter 117 of the Laws of 1885 the following provision: "And any person who shall begin the practice of medicine or surgery in this state for fee or

reward, after the passage of this act, without first having obtained license from said board of examiners (meaning the state board of medical examiners) shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery [731] or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned at the discretion of the court for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts on the ground that everyone had an "inalienable right to life, liberty and the pursuit of happiness," as our great Declaration phrases it, and that by that guaranty it is the right of everyone to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon section 7, article 1 of our state constitution, which forbids exclusive privileges and emoluments to any set of men, and section 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the fourteenth amendment to the constitution of the United States, which prohibits any State "to deny to any person the equal protection of the law."

There was undeniably great force in the argument on that side. The law-making power slowly in this state and in others yielded to the view that it could or should pass such act. In 1858-59, chapter 258, it first incorporated "The State Medical Society," and authorized the above examination, and prohibited anyone to practice medicine or surgery or prescribe for the cure of diseases for fee or reward without such license, but was careful to add a proviso that no one who should practice without such license should be guilty of a misdemeanor, the only penalty being that if he practiced on credit he could not recover his fees in the courts. The law remained thus till the above recited act, passed in 1885, and which was made prospective. The constitutionality of this [732] last statute was fully considered, and after a most able argument against it by counsel was sustained by this court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and impostors, and in no sense the creation of a monopoly or special privilege": State v. Call, 121 N. C. 646, 28 S. E. 517. If the

object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the legislature was prohibited by the constitution from enacting it, nor could the legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any state system of healing: State v. McKnight, 131 N. C. 723, 42 S. E. 580.

After these decisions moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guarantee that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated if they chose by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the legislature could not, under the constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the legislature could not prescribe that anyone was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian" and the like—should be examined [733] upon a course, such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the board of examiners.

At the last session of the general assembly the following act (Act 1903, c. 697) was passed amendatory of section 3122 of the Code: "For the purpose of this act the expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that this shall not apply to midwives nor to nurses; provided, further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology,

urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis; provided this act shall not apply to any person who administers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson in McAden v. Jenkins, 64 N. C. 801, noted, as of common knowledge, and reiterated in Raleigh etc. R. R. Co. v. Jenkins, 68 N. C. 505, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. Though there may be no promoters here, the same rule applies to this act amending the charter of this corporation, in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," [734] the act essays to provide that the expression "practice of medicine and surgery shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever"; that is, the practice of surgerv and medicine shall mean practice without surgery or medicine if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says: "Any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs on the courthouse square who banishes headache, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression forbidding treatment "for fee or reward" by other than an M. D., "by any

other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D. [735] It is not even admissible to "minister to a mind diseased" in any method or even dissipate an attack of the "blues" without that label duly certified. Is not this creating monopoly, and the worst of monopolies, that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine?" Such examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guarantee that is given by his license that the M. D. is competent. But how about those who are too poor or too ignorant or too perverse to wish that kind of treatment? Is it requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this state to remove corns or to plug teeth without full knowledge of the materia medica, or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomachache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the constitution.

[736] Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s it would necessarily follow that the legislature would have to

prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly. The medical profession merited and obtained a due share of prosperity prior to above statute of 1903 and will receive no great detriment because the defendant cannot be punished under its provisions.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease except by their own system is quackery. Is this point to be decided by the M. D.'s themselves through an examining committee of five of their own number, or is the public the tribunal to decide by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it, but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, hetrrodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children of others [737] under his care, whereby they are injured, he is liable to punishment, but whether it was proper treatment or not is a matter of fact to be settled by a jury of his peers and not a matter of law to be decided by a judge nor prescribed beforehand by an act of the legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, fifteen centuries older than the Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa in ancient Elam, there are found (sections 215-225) regulations of the medical profession, fixing a scale of fees and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks: "Is there no balm in Gilead? Is there no physician there?" The public have a right to know

that those holding themselves out as members of that ancient and honorable profession are competent and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title of M. D., or prohibiting the use of such remedies altogether, neither of which results the legislature could have contemplated, and both of which are forbidden by the provisions of the constitution above cited.

[738] In this case the defendant is found guilty of the following acts, and no more: 1. Administering massage, baths and physical culture; 2. Manipulating muscles, bones, spine and solar plexus; 3. Kneading the muscles with the fingers of the hand; 4. Advising his patients what to eat and what not. And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, materia medica and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the state to regulate the "practice of medicine and surgery" and to throw around the public any reasonable protection against unfit members of that honorable profession and provide against malpractice, but the general assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practice it. But it is not found here that the defendant is deceiving and injuring the public or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It

may be that if he were not there some of the patients might call in an M. D., but that is due possibly to the ignorance or perversity of the patients who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases.

The law is thus stated in Lawton v. Steele, 152 U. S. [739] 137, 138, 14 Sup. Ct. Rep. 501: "The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said, on page 138, 152 U. S., and page 501, 14 Sup. Ct. Rep.: "In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a practical inhibition of certain occupations harmless in themselves and which might be carried on without detriment to the public interests." See, also, State v. Pendergrass, 106 N. C. 667, 10 S. E. 1002; Ohio v. Gardner, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136.

License is required for the practice of pharmacy, of dentistry, of law and many other skilled professions. We have a state system of law, for the "law is the state," and laws are prescribed by the legislature, and we also have a state system of education, yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale or any other legal instrument whatever, nor is it made punishable to settle litigation out of court by arbitration or otherwise without the aid of a lawyer, nor to teach in other than the state schools. Though there are many methods of treating disease, among which the legislature is not authorized to select one as the state system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment upon examination of that system, thus denying mankind any relief from pain and suffering except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M. D.'s themselves [740] nor by the courts. Judges are lawyers and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who

eschew medicine and surgery may well object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one. His learned counsel contends that the act of 1903, chapter 697, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses and those who profess to heal by prayer, who minister to the sick for fee or reward 'by any other method whatsoever,' shall be construed to be practicing medicine or surgery, and then follows this language: 'Provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in, except pharmacy, materia medica, therapeutics and the practice of medicine, and in addition he is required to stand an examination in branches that the regular medical student is not required to be examined on, as follows: 'histology, urinalysis and toxicology, regional anatomy, neurology, bacteriology, gynecology and physical diagnosis.' But it is remarkable that he is not required to [741] pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations and osteopathic diagnosis."

As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed courses of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to say that the acts of which he was convicted of doing "for a fee," to wit, using massage, baths, physical culture, manipulating muscles, bone, spine and solar plexus, and advising his patients as to diet, could be done as safely to

the public, so far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practice osteopathy, and of course only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way.

The term "practice of medicine and surgery" embraces probably the larger and certainly by far the most profitable part of the "treatment of diseases," but is not coextensive with the latter term and cannot be made so unless "surgery and medicine" are adopted as the state system of treatment, a monopoly, and all other methods are made indictable. On the other hand, the State Medical Society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners and practices which they would not wish to recognize. All the law [742] so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Doctor Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole materia medica was sunk to the bottom of the sea it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this state has said that out of twenty-four serious cases of disease three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than His followers were casting out devils and curing diseases, He said: "Forbid them not."

Upon the special verdict the defendant should be adjudged not guilty.

Reversed.

Walker and Connor, JJ., concur in result.

PRACTICE OF OSTEOPATHY, CHRISTIAN SCIENCE, MAGNETIC HEALING, OR CLAIRVOYANCE AS PRACTICE OF "MEDICINE OR SURGERY."

I. Osteopathy.
a. Not Generally Deemed Practice of Medicine or Surgery.
b. Cases Announcing Contrary Rule.
c. Regulation by State of Practice of Osteopathy.
II. Christian Science.
a. Regulation of Practice by State.
III. Magnetic Healing.
IV. Clairvoyance.

I. Osteopathy.

a. Not Generally Deemed Practice of Medicine or Surgery.—Within the last decade several new "fads," or "arts," or methods of healing and curing disease have sprung into existence. The principal among them is, perhaps, that generally known as osteopathy, consisting, to the best of our information, in a system of rubbing and kneading the body, applying hot or cold baths, and prescribing diet and exercise for the treatment, relief and cure of bodily infirmity or disease, without the use of medicine, drugs or surgery.

Since this method of treating disease or infirmity has been launched and brought to the notice of the public, its practice has become somewhat general and efforts have been made to put a stop to it by arresting the practitioner for practicing medicine without a license in violation of statutes requiring physicians and surgeons to procure a license before entering upon the practice of their profession.

When such an arrest is made, the question which the court is most generally called upon to solve is, whether one who practices osteopathy is engaged in the practice of medicine or surgery within the meaning of such statutes.

Upon this question, the courts of last resort of the several states seem, at the present time, to be about equally divided.

No doubt, the better rule is, that under existing statutes, osteopathists are not liable to punishment for practicing "medicine or surgery" without a license, nor can an examination, as to their qualications for a license be required of them. This result follows, however, because the language of the statutes is not broad enough to include those who practice this system of healing, and not because the practice of osteopathy cannot be regulated by statute. On the contrary, it can, and in most of the states we apprehend soon will, be regulated by statute.

The earliest case deciding that the practice of osteopathy is not within the provisions of a statute making the practice of medicine or surgery without a license a misdemeanor, is that of Smith v. Lane, 24 Hun, 632. In this case it was held that such a statute does not apply to one who undertakes to cure diseases by manipulating the patient's body, by rubbing, kneading and pressing it, and such person is entitled to recover a compensation agreed to be paid for such

services, although he is not a graduate of a medical school and has no license permitting him to practice either medicine or surgery. In passing upon this question the court said that "the act did not, in terms, prohibit any person from following an occupation of this description, and without some prohibition it would seem to be as lawful as any other in which one person might render services at the request of and for the benefit of another. The statute in terms merely declared it to be a misdemeanor for any person to practice medicine or surgery who is not authorized to do so by a license or diploma from some chartered school, state board of medical examiners or medical society, or who shall practice under cover of a medical diploma illegally obtained. It was in no manner shown upon the trial that either of these societies would issue a certificate for the mere purpose of including in it the occupation followed by plaintiff. And the language of the act is at variance with the supposition that it would be done, for the certificate is not permitted to be issued unless the person applying for it shall be found qualified to practice all the branches of the medical art mentioned in it. To entitle a person to a certificate, it would be necessary that he should be qualified to practice either medicine or surgery in all its branches. If that was not made to appear, he could receive no certificate under the provisions of this act. For that reason it appears to be quite manifest that the object of the legislature in the enactment of this chapter was only to provide for regulating the practice of medicine or surgery, as those terms are usually or generally understood, and confining them to such significance, it is evident that they would not include the occupation of plaintiff. The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances. It was entirely proper for the legislature, by means of this chapter, to prescribe the qualifications of the persons who might be intrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. To allow incompetent or unqualified persons to administer or apply, medical agents, or to perform surgical operations, would be highly dangerous to the health, as well as the lives of the persons who might be operated upon, and there is reason to believe that lasting and serious injuries, as well as the loss of life, have been produced by the improper use of medical agents and surgical instruments or appliances. It was the purpose and object of the legislature by this act to prevent a continuance of deleterious practices of this nature, and to confine the uses of medicine and the operations of surgery to a class of persons who, upon examination, should be found competent and qualified to follow these professional

pursuits. No such danger could possibly arise from the treatment to which the plaintiff's occupation was confined. While it might be of no benefit, it could hardly be possible that it could result in harm or injury. And for that reason no necessity existed for interfering with this pursuit by any action on the part of the legislature. It may be that credulous persons would be received into the employment of the plaintiff, and in that manner subjected to imposition. But it was no part of the purposes of this act to prevent persons from being made the subjects of mere imposition.

"If the plaintiff's pretenses were well founded, then diseases would no longer be formidable and even death itself would be deprived of its terrors. But because he has professed more than he has ability to accomplish, he cannot, on that account, be subjected to the disability provided for by this act. His system of practice was rather that of nursing than of either medicine or surgery.

"It could, in no event, result in any other injury to the person practiced upon than that of possible financial loss. No bodily disability or disease could either result from or be aggravated by the applications made by him. And what he did, in no just sense, either constituted the practice of medicine or surgery. He neither gave nor applied drugs or medicine nor used surgical instruments. He was outside the limits of both professions, and neither one of the schools or societies mentioned in the act had jurisdiction over him or could have intervened to authorize, restrict or prevent, him in the occupation he was engaged in following. While his services may have afforded no benefit to the persons receiving them, he was not prohibited from performing them by anything in this act, and no other law was violated by the contract which the evidence tended to show had been entered into": Smith v. Lane, 24 Hun, 634. The next case in order is that of State v. Liffring, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168, wherein it was determined upon the same reasoning above set forth, that a person does not practice medicine in contravention of a statute which forbids anyone, without a certificate or qualification to prescribe for the use of another, "any drug or medicine or other agency," for the treatment of disease, where he merely prescribes a "system of rubbing and kneading the body," commonly known as osteopathy, for the treatment, cure and relief of certain bodily infirmities or diseases. Such a system is not an "agency" within the meaning of the statute.

Next in order is the case of Nelson v. State Board of Health, 108 Ky. 769, 22 Ky. Law Rep. 438, 57 S. W. 501, holding that one who practices osteopathy, not using medicine or surgical appliances, is not engaged in the practice of medicine, within the meaning of a statute requiring a license for such practice. The court further held that though the statute provided that "to open an office for the practice of medicine or to announce to the public in any way a readiness to treat the sick or afflicted shall be deemed to engage in the practice

of medicine within the meaning of this act," this, nevertheless, does not refer to any but those essaying to practice medicine proper by the use of drugs. Referring to the act requiring a license of practitioners of medicine the court said: "If the act applies to appellant, he can in no case practice his system in this state, for however well qualified he may be, he cannot be examined for a license as a physician, and he could not, without abandoning his practice as an osteopath, obtain a diploma from a medical college. If the statute applies to him it also applies to trained nurses, and all others of that class who, for compensation, minister to the wants of the sick. The result of such a construction of the statute would be to compel every one, whether willing or unwilling to employ a registered physician to care for him when sick, or to trust himself entirely to gratuitous services, however much he might prefer skillful nursing or medical treatment. It is doubtful if the legislature has the right under the constitution thus to restrict the free choice of the citizen in a matter concerning only himself, and not the people at large. Taking the statute as a whole, we do not think that this was within the legislative intent, or that the act was designed to do more than regulate the practice of medicine by physicians and surgeons. . . . . Appellant is, in no proper sense, a physician or surgeon. He does not practice medicine. He is rather on the plane of a trained nurse. If by kneading and manipulating the body of the patient he can give relief to suffering, we can see no reason why he should not be paid for his labor as other laborers. Services in kneading and manipulating the body are no more the practice of medicine, than services in bathing a patient to allay his fever or the inflammation of a wound. Appellant may not prescribe or administer medicine or perform surgery, but so long as he confines himself to osteopathy, kneading and manipulating the body, without the use of medicine or surgical appliances, he violates no law, and appellee should not molest him": Nelson v. State Board of Health, 108 Ky. 769, 22 Ky. Law Rep. 438, 57 N. W. 505.

The next case to hold that the practice of osteopathy is not within the provisions of a statute making the practice of medicine or surgery without a license a misdemeanor, is that of State v. McKnight, 131 N. C. 717, 42 S. E. 850. In this case the very learned jurist, Mr. Justice Clark, who also delivered the opinion in the principal case, in terse but quaint language said, after reaching the conclusion above mentioned: "It is argued to us that the science, if it be a science, of osteopathy is an imposition. Of that, we, judicially speaking, know nothing. It is not found as a fact in this verdict. We only know that the practice of osteopathy is not the practice of medicine or surgery as commonly understood, and therefore it is not necessary to have a license from the board of medical examiners before practicing it. If it is a fraud and an imposition, and injury results, the osteopath is liable, both civilly and criminally.

"Certainly, baths and diet could be advantageously prescribed to many people, and rubbing is well enough if the patient is not rubbed the wrong way. The real complaint is that osteopaths restrict themselves to these remedies and do not resort to drugs and surgery, but that very fact establishes that they do not violate the law requiring a license to practice medicine and surgery. Doubtless, there is an appeal to the imagination, but that is a necessary ingredient to all systems of healing. Who does not know that a prescription by a physician in whom the patient has implicit confidence is oftentimes more effective than the same treatment by one in whom he has none, and that at times bread pills and other harmless prescriptions are administered with good results. The aim of medical science, which is now probably the most progressive of all the professions is simply to assist nature. Osteopathy proposes to do that by other methods than by the use of medicines or the surgeon's knife.

"We attach no weight to the argument that the defendant hung out his sign and advertised himself as a 'doctor.' The special verdict finds that he had a diploma from a college of osteopathy bestowing the title on him. Certainly, the courts cannot abate a man as a nuisance, because someone gives him, or he gives himself, a title. . . . . The state has not restricted the cure of the body to the practice of medicine and surgery—'allopathy' as it is termed—nor required that before anyone can be treated for any bodily ill, the physician must have acquired a competent knowledge of allopathy, and be licensed by those skilled therein. To do that would be to limit progress by establishing allopathy as the state system of healing, and forbidding all others. This would be as foreign to our system as a state church for the cure of souls. All the state has done has been to enact that when one wishes to practice medicine or surgery, he must as a protection to the public—not to the doctors—be examined and licensed by those skilled in surgery and medicine. To restrict all healing to one kind, as to allopathy, excluding homeopathy, osteopathy, and all other treatments, might be a protection to doctors in surgery and medicine, but that is not the object of the act, and might make it unconstitutional, because creating a monopoly. The state can only regulate for the protection of the public. There is also divine science—which someone has said is neither divine nor a science—and there may be other methods still. Whether these shall be licensed and regulated is a matter for the law-making power to determine before any question in that respect can come before the court. Certainly, a statute requiring examination and license before beginning the practice of medicine or surgery neither regulates nor forbids any mode of treatment which absolutely excludes medicine and surgery from its pathology": State v. McKnight, 131 N. C. 722-724, 42 S. E. 850. In the very late case of Hayden v. State, 81 Miss. 291, 95 Am. St. Rep. 471, 33 South. 653, the view is expressed that a practitioner of osteopathy, who treats

diseases only by manipulation of the patients limbs, muscles, ligaments and bones, does not practice medicine within the meaning of a statute forbidding the practice of medicine without a license, and defining the practice of medicine as meaning, "to prescribe or direct for the use of any person any drug, medicine, appliance or agency, for the cure of disease, fracture or wound." In deciding this case, the court said: "It is perfectly manifest, as we think, from the agreed statement of facts, that Hayden used neither drug or medicine as meant by the act of March 19, 1896. It is equally manifest to us that the legislature, by the use of the words, 'appliance and agency' did not intend to include such treatment. Our attention has been called to no statement of osteopathic treatment in all the literature upon this subject which characterizes the treatment of an osteopath of his patient as an appliance or agency. There is an incongruity in such an application of such words.

"Osteopaths themselves do not speak of their manipulation of the nerves, ligaments, bones and other parts of the human body as being agencies or appliances of any sort or in any sense. In any strict and proper use of such words, they cannot be so denominated. If one, not an osteopath directs a blow at their art, it is becoming that he use a term of description not to be mistaken. We concluded that the act of March 19, 1896, was not intended to regulate the practice of osteopathy in Mississippi. The course of study and examination prescribed in our law upon the subject seems to mark it out as a curriculum of the allopaths. It at least suits them in many respects, but its chemistry and materia medica are not specially adapted to assist the practice of osteopathy. They make no use of the immense learning contained on these subjects, so highly valued by the regular physician. It appears to us that our legislation upon the subject of the practice of medicine has been framed by the allopaths to suit their views of the medical art and with the laudable design of excluding from the practice the unskillful and the ignorant, and it was not intended to set up a universal standard of therapeutics, from which none could depart. A wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy so as to exclude the ignorant and unskillful practitioner of the art among them. The world needs, and may demand, that nothing good or wholesome shall be denied from its use and enjoyment": Hayden v. State, 81 Miss. 299, 95 Am. St. Rep. 471, 33 South. 653.

b. **Cases Announcing Contrary Rule.**—While we believe the better rule to be that nearly all of the existing statutes for the regulation of the practice of medicine are to be justified, if at all, only on the ground that they are necessary to protect the public against quack medical practitioners who prescribe drugs and medicine in treating disease, and that they are not directed against, nor intended to include, those who eschew the practice of medicine altogether and advance some

new theory, such as osteopathy, for the alleviation and cure of the sick or disabled, yet authority is not wanting to sustain the proposition that those who practice osteopathy, Christian Science, mental healing, magnetic treatment or any such method of healing, practice "medicine" within the meaning of statutes requiring those who engage in the practice of medicine or surgery to take out a license and to be endowed with certain qualifications in the use of medicines. Thus, it has been uniformly held in Illinois that a statute regulating the practice of medicine and providing that "any person shall be regarded as practicing medicine within the meaning of this act who shall treat, operate on, or prescribe for any physical ailment of another," is constitutional, and that one who practices osteopathy without the use of drugs or medicines is within the meaning of the statute and liable for a penalty for practicing medicine without a license: Eastman v. People, 71 Ill. App. 236; Jones v. People, 84 Ill. App. 453; People v. Jones, 92 Ill. App. 445; People v. Gordon, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858, reversing the same case on appeal from the decision reported in 96 Ill. App. 456. These cases hold that simply to treat or operate upon a person for a physical ailment by rubbing the affected part with the hands is a treatment or operation for a physical ailment, and is practicing medicine within the meaning of the act to regulate the practice of medicine: Jones v. People, 84 Ill. App. 453; People v. Jones, 92 Ill. App. 445. In People v. Gordan, 194 Ill. 571, 88 Am. St. Rep. 165, 62 N. E. 858, it was said: "We all agree that the objects and purposes of this and similar statutes are to protect the sick and suffering and the community at large, against the ignorant and unlearned who hold themselves out as being possessed of peculiar skill in the treatment of disease, from holding themselves out to the world as physicians and surgeons without having acquired any knowledge whatever of the human system or the diseases and ailments to which it is subject. Without some knowledge of the location and offices of the various nerves, muscles, and joints, the manipulations of those parts and the flexing of the limbs cannot be intelligently, if, indeed, safely practiced. Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and as such administering osteopathic treatment. One falls properly within the profession of a trained nurse while the other does not."

In Little v. State, 60 Neb. 750, 84 N. W. 248, it was also held that one who practices what is known as osteopathy without obtaining a certificate from the state board of health is a practitioner of medicine as defined by a statute regulating the practice of medicine and surgery and is liable to the penalty prescribed specifically for practicing medicine without a license.

In a late case in Alabama—Bragg v. State, 134 Ala. 165, 32 South. 767—it was held that a statute providing that no person shall prac-

tice "medicine in any of its branches or departments" without a certificate of qualification from an authorized board of medical examiners, and imposing a penalty for practicing medicine without such certificate was constitutional when applied to an osteopathist. That the word "medicine" as used in such statute has a technical meaning, and as a science, the practitioners of it are not simply those who prescribe drugs or other medicinal substances as remedial agents, but are also those who diagnose disease and prescribe or apply any therapeutic agent for its cure. Hence, such statute embraces these who practice osteopathy, which as a science or art, includes the diagnosis of disease and the treatment thereof by a system of manipulation of limbs and body of the patient with the hands by kneading, rubbing or pressing upon the different parts of the body.

In deciding this case, Mr. Justice Tyson, who wrote the opinion, said:

"It is admitted that defendant was engaged in the practice of osteopathy as a profession and means of livelihood, without having obtained a certificate of qualification from one of the authorized boards of medical examiners. The most important question presented is whether the practice of osteopathy is 'the practice of medicine in any of its branches or departments,' within the meaning of section 3261 of the Civil Code and section 5333 of the Criminal Code. The contention of defendant is that it is not. He predicates his insistence mainly (indeed, we may say wholly) upon the fact that in the practice of osteopathy no drugs or other medicinal substances are administered or applied, internally or externally; nor is the knife used or any form of surgery resorted to in the treatment of diseases. In fact, the practitioners of that school of the healing art repudiate as remedial agents all drugs, medicinal substances, and the knife, and other surgical instruments and appliances, in the treatment or alleviation of diseases, and therefore need have no knowledge of their use. They, of consequence, know nothing of the medicinal properties of drugs and other medicinal substances, or of the compounding and administering of drugs in the cure of diseases. Their method of treatment is entirely external, consisting of 'a system of a manipulation of the limbs and body of the patient with the hands, by kneading, rubbing, or pressing upon the parts of the body.' However, in order to practice the profession of osteopathy skillfully and scientifically, it is admitted that the practitioner must know anatomy, physiology, hygiene, histology, and pathology. Confessedly, the requirement of a knowledge on the part of the practitioners of all of these branches of the science of healing the sick or diseased is to enable him to skillfully determine the disease with which his patient is afflicted, and to aid him in making a proper application of his system of manipulation. For it is entirely clear from the evidence that the practitioner does not make the same application of his remedy to all diseases, but that he applies such system of manipula-

tion as is most remedial in alleviating or curing the particular disease he is called upon to treat. In other words, after a diagnosis of the disease of the patient he applies the remedy most suitable to its cure; confining it, however, to his system of manipulation as a remedial agent. So, too, a practitioner of medicine is required to know anatomy, physiology, hygiene, histology, and pathology, in order to enable him to skillfully and scientifically determine from what disease his patient is suffering; and, after so determining, he must also know how and what remedial agents should be prescribed for the alleviation or cure of the disease. So, after all, the only difference between the two is in the matter of therapeutics—that branch of medicinal science which considers the application of remedies as a means of cure. The former, as we have shown, applies his external remedies exclusively, while the latter prescribes internal or external, or both, as the exigencies of the case may require. The result sought to be accomplished by each is the same—to relieve the patient's illness; to cure him. Both are practicing the art of healing or curing human diseases.

"But it is said the words 'the practice of medicine,' or 'who practices medicine,' as used in the statutes, should not be extended to all practitioners of the art or science of healing or curing diseases, but that their proper interpretation or construction includes only those persons who employ medical substances or drugs as remedial agents for the alleviation or healing of diseases. This contention is based upon the proposition that the word 'medicine,' in its popular sense, and as commonly understood, is a remedial substance or drug, and that the practice of medicine, as popularly understood, inseparably includes as its great and overruling constituent the administration of drugs and other medicinal substances as remedial agents. Indeed, the whole superstructure of defendant's theory that as a practitioner of osteopathy he is not engaged in the practice of medicine has for its foundation that the interpretation of the words 'medicine or practice of medicine' must be accepted in the sense in which these words are commonly used. With this foundation or base destroyed, his theory must fall. In other words, if his premise is shown to be fallacious, of necessity his conclusion must be false. So, then, the question is, What is the correct rule of interpretation of these words? Shall we interpret them in their popular sense or as commonly understood, or are they to be interpreted (being technical words, used in reference to a technical subject) according to the meaning or use they have when applied to the particular art or science with reference to which they are used? It cannot be well doubted that if they are technical words, having a technical meaning when applied to the particular art or science to which they refer, such use or meaning must be given to them, unless from the context of the statutes a different use or meaning is made apparent."

After some discussion Judge Tyson reached the conclusion that "it is made entirely clear, both by definitions and history, that the word 'medicine' has a technical meaning, is a technical art or science, and as a science the practitioners of it are not simply those who prescribe drugs or other medicinal substances are remedial agents, but that it is broad enough to include, and does include, all persons who diagnose disease, and prescribe or apply any therapeutic agent for its cure. . . . . Our conclusion, therefore, is that the defendant was engaged in the practice of medicine, within the meaning of the statutes": Bragg v. State, 134 Ala. 170, 32 South. 768.

c. **Regulation by State of Practice of Osteopathy.**—There seems to be no doubt as to the power of the state to regulate the practice of osteopathy therein by statute providing that one practicing such system of healing shall be possessed of certain qualifications of fitness and shall obtain a license permitting him to practice: State v. National School of Osteopathy, 76 Mo. App. 439; Hayden v. State, 81 Miss. 299, 95 Am. St. Rep. 471, 33 South. 653; State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325; State v. McKnight, 131 N. C. 723, 42 S. E. 580; wherein it was said that "if the general assembly shall deem osteopathy a legitimate calling, it may see fit possibly to secure educated, and skilled practitioners by requiring an examination and license by learned osteopaths of applicants for license, but certainly the examination would be on subjects appropriate to secure competency therein, and not on an entirely different course of learning. Such as that prescribed for applicants to practice medicine or surgery": State v. McKnight, 131 N. C. 723, 42 N. E. 580. This has been done in at least four states—California, Indiana, Missouri and Ohio—where the practice of osteopathy is regulated by statute as a treatment separate from medicine by requiring a certain amount of study or a diploma from a certain school before a person can practice such system of healing or curing disease: Cal. Stats. 1901, p. 113, c. 99; State v. National School of Osteopathy, 76 Mo. App. 439; State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325. One who has an established practice in the healing of disease by the method known as osteopathy, may be, by statute, required to conform to such reasonable standard respecting qualification therefor as the legislature may prescribe, having in view the public health and welfare: State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325. A statute permitting the licensing of osteopaths, while excluding those engaged in "mental healing" has been held not an unlawful discrimination which will render the statute void: Parks v. State, 159 Ind. 211, 64 N. E. 862. But a legislative enactment which discriminates against osteopaths by requiring them to hold diplomas from a college requiring four years of study as a condition to their obtaining limited certificates which will not permit them to prescribe drugs or perform surgery, while not requiring such time of

study from those contemplating the regular practice as a condition to their obtaining unlimited certificates for the practice of medicine and surgery, is as to such discrimination, void, and compliance therewith cannot be exacted of those who practice osteopathy: State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325. Under the statute of the state of Missouri regulating the practice of osteopathy there is no power to issue a diploma except to one who has been in personal attendance, as a student in such school, for at least four terms of not less than five months each before graduation and the fact that he is learned in the science of medicine and surgery and proficient in the study and methods of osteopathy, will not warrant the issue of such diploma: State v. National School of Osteopathy, 76 Mo. App. 439.

II. Christian Science is another comparatively new method of healing the sick and consists mainly in a treatment of disease by inaudible prayer in the presence of the sick or at a distance, based upon the theory that all disease, even that of a contagious character, is mere belief and not based on real facts: In re First Church of Christ, 205 Pa. St. 543, 97 Am. St. Rep. 753, 55 Atl. 536. And the rule, so far as a rule can be based on the weight of authority, is, that the practice of treating the sick under such system is not the practice of medicine within the meaning of statutes regulating the practice of medicine and surgery. Thus, it has been held that a Christian Scientist believing that disease is an illusion of the mind and not a reality, and treating the sick on this theory and that they may be cured through the office of prayer, is not a physician within the statute regulating the practice of medicine and surgery by requiring persons who engage in practice to have diplomas and to obtain certificates from the board of health, or to obtain a license prior to beginning practice. Such a statute regards as practicing medicine only those who profess publicly to be physicians and to prescribe drugs for the sick or one who appends "M. D." to his name: Kansas City v. Baird, 92 Mo. App. 204. It has also been decided that the practice of Christian Science, consisting in prayer for divine assistance, the encouragement and direction of the thoughts of the patient, without recommending or administering any drug or medicine, or giving him any course of physical treatment, is not a violation of a statute prohibiting the practice of medicine or surgery in any of its branches without a certificate from the state board of health: State v. Mylod, 20 R. I. 632, 20 Atl. 753. The practice of medicine under such statute relates to the art of preventing, curing or alleviating disease and pain and, popularly speaking, it consists in the discovery of the cause and nature of disease and the administration of remedies, or prescribing treatment therefor. The object of the statute is to regulate the practice of medicine and surgery alone, and thus secure the safety and protect the health of the public. Hence, mere words of encouragement,

prayer for divine assistance or the teaching of Christian Science do not constitute the practice of medicine in either of its branches, and the assumption of the title of "doctor" by a Christian Scientist, if not prohibited by the statute, is not unlawful: State v. Mylod, 20 R. I. 642, 40 Atl. 753. On the other hand, the statute in Nebraska requires that one practicing medicine shall first procure a certificate from the state board of health and that "any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another." And in State v. Buswell, 40 Neb. 159, 58 N. W. 728, it was held that this statute was broad enough to include, and did include, one who practices Christian Science. Such practitioner who has not complied with the statute as to obtaining a certificate to practice "medicine" renders himself liable to its penalties. He must be considered an imposter, and the object of the statute is to prevent imposition upon the afflicted by ignorant and unqualified imposters and pretenders to the healing power: State v. Buswell, 40 Neb. 158, 58 N. W. 728.

In Wheeler v. Sawyer (Me.), 15 Atl. 67, it was held that one may recover upon an express promise to pay for services rendered by him in practicing the healing art according to the principles and methods of those calling themselves Christian Scientists, if such practitioner has complied with the statute requiring persons not licensed by medical associations to obtain a certificate of good moral character from the officers of the town where they reside.

a. **Regulation of Practice by State.**—The practice of Christian Science as a healing art has received severe condemnation and in one state at least it is entirely prohibited. In Pennsylvania, the supreme court in a late and well-reasoned case, absolutely refused to grant a charter to enable an association to teach and practice the method of curing disease, known as Christian Science, upon the ground that such a system of healing the sick and afflicted was opposed to the general policy of the law of the state relative to the existence, treatment and cure of disease: In re First Church of Christ, 205 Pa. St. 543, 97 Am. St. Rep. 753, 55 Atl. 536. In this connection it may not be amiss to mention a late case in New York holding that a statute making it criminal for parents and others to omit to furnish medical attendance to a minor, does not violate constitutional provisions guaranteeing to all persons the free exercise and enjoyment of religious profession and worship. Nor does the religious belief of the accused constitute any defense to a prosecution under such statute, as in a case where he has omitted to call a regular physician because of his belief in Christian Science or Divine healing, which could be accomplished by prayer, and because he did not believe in physicians: People v. Pierson, 176 N. Y. 201, ante, p. 666, 68 N. E. 243. In Kansas City v. Baird, 92 Mo. App. 204, it appeared that a child affected with diphtheria was treated by a Christian

Scientist and died. The practitioner was then arrested and tried for practicing medicine without a license or diploma, but the court held that the statute regulating the practice of medicine and surgery regards as practicing medicine only those who profess publicly to be physicians and to prescribe for the sick, or who append "M. D." to their name, and that a Christian Scientist is not a physician or one who practices medicine within the meaning of the statute. Hence no conviction could be had in such case under the statute. We cannot refrain from quoting from the opinion in this case for the purpose of showing that to the ordinary mind the healing art practiced by Christian Scientists as a system of cure for all disease, whether contagious or not, is utterly ridiculous and absurd, and ought not to be tolerated except in cases of what, for want of a better term, may be termed or designated as "mental" or "imaginary ailments." The testimony in the case showed that the practitioner was what is known as a Christian Scientist, and that she attended a girl ten years of age, who was sick with diphtheria, generally considered a contagious disease, being requested so to do by the child's mother, who was also a Christian Scientist, and that the practitioner had received compensation for other like attendance in the same family and was to receive pay for the attendance in the present case. The nature of the system of cure and the result were stated by the mother as follows: "The defendant demonstrated the principles of the Christian Science. She imparted to the child the understanding of the truths of Christian Science audibly and mentally. Christian Scientists put out the thought of disease in their minds. She imparted the truths of the science, impressed upon the child the understanding of Christian Science, there is no disease, the unreality of diseases and the allness of God. She talked of these truths and explained them. I called the defendant to attend the child as I would a teacher to instruct her in the spiritual understanding and the truth. In Christian Science we put all thoughts of disease in our consciousness. The child was conscious. If she had been unconscious defendant would have demonstrated in her own thoughts these truths. There is no disease. The child was under a delusion of disease and the object is to remove the illusion. If the child was only a month old it would be reached through the parents. The defendant is a demonstrator of the principles of Christian Science. If a person dies it is a lack of demonstration. If the person gets well, it is the demonstrating principle, the illusion has been removed. When the illusion is dispelled they get well." The breadth of the belief in the efficacy of Christian Science is shown by the following questions and answers: "Q. Suppose that this child had an arm broken, would it, in your idea, be an illusion, and the arm not broken? A. Yes, sir, it would. Q. It wouldn't be broken? A. It might be in the sense of the person, but in reality it wouldn't. Q. Supposing that it be cut off, would that be an illusion? A. Yes, sir. Q. There is no illusion about this

child being dead? A. Yes, sir": Kansas City v. Baird, 92 Mo. App. 207, 208. With as much reason it may be said to the practitioner of Christian Science when he presents his bill for professional services and demands money in payment therefor, "My dear sir, there is no such thing as money; you may think that money exists, but this is a sure illusion of your mind. Believe that money has no existence, and that you have no use for it, and the desire for it will then cease to trouble you. Consider yourself paid and you are paid." As was well said in First Church of Christ, 205 Pa. St. 543, 97 Am. St. Rep. 755, 55 Atl. 536: "It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient. And when the results of this knowledge and experience have been crystallized into legislative enactments, declarative of what the good of the community requires in the treatment of disease, and of the qualifications of those who publicly deal with disease, anything in opposition thereto may fairly be taken as injurious to the community. Our laws recognize disease as a grim reality to be met and grappled with as such. To secure the safety and protect the health of the public from the acts of incompetent persons, the law prescribes the qualifications of those who shall be allowed to attempt the cure or healing of disease. It is not for the purpose of compelling the use of any particular remedies, or of any remedies at all. It is only designed to secure competent service for those who desire to obtain medical attendance. In certain diseases the individual affected may be the only one to suffer for lack of proper attention; but in other types, of a contagious or infectious nature, they may be such as to endanger the whole community, and here it is the policy of the law to assume control and require the use of the most effective known means to overcome and stamp out disease, which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat, by those not possessing the lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. but this is not wholly true. 'For none of us liveth to himself, and no man dieth to himself,' and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law nor reason has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of other means which have been given to us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine."

III. Magnetic Healing.

Closely allied to the practice of osteopathy and Christian Science for the cure of disease is another new "fad" in the healing art, known as magnetic healing, and it has been held that requiring a license to be obtained by a magnetic healer before engaging in the healing art, does not deprive him of his liberty or property without due process of law: Parks v. State, 159 Ind. 211, 64 N. E. 862. A magnetic healer who styles himself "professor" without being a graduate of any school of medicine, and who holds himself out to the public as a healer of disease, and whose treatment in a particular case consisting of holding an affected human limb and rubbing it to effect a cure, and who carries on such practice without first procuring a license, is within the terms of a statute regulating the practice of medicine, requiring a license to be obtained therefor, and providing that "to open an office for such purpose or to announce to the public in any way a readiness to practice medicine in any county of the state, or to prescribe for, or to give surgical assistance to, or to heal, cure or relieve, or to attempt to heal, cure or relieve those suffering from injury or deformity, or disease of mind or body. . . . . It shall also be regarded as practicing medicine within the meaning of this act, if anyone shall use in connection with his or her name the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' or 'Healer,' or any other title, word, letter or designation intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches": Parks v. State, 159 Ind. 211, 64 N. E. 862. One who advertises himself as a magnetic healer, and who gives treatment after diagnosis by rubbing and kneading the body for the purpose of freeing the nerve force, is practicing medicine within the meaning of a statute providing that any person shall be regarded as practicing medicine, "who shall treat or profess to treat, operate on or prescribe for any physical ailment or physical injury or deformity of another," althought such magnetic healer does not use drugs, medicine or instruments; nor is he within the exception made by the statute in favor of those treating the sick by mental or spiritual means, even though he accompanies his treatment by mental suggestion to his patients, that their ailments are not incurable: People v. Gordon, 194 Ill. 560, 62 N. E. 858, reversing People v. Gordon, 96 Ill. App. 456. One who advertises and holds himself out to the public as "Dr. Phippin, Magnetic Healer," is a medical practitioner within the meaning of a statute regulating the practice of medicine requiring certain qualifications of practitioners, and imposing a penalty for engaging in the practice of medicine without having complied with the requirements of such statute: People v. Phippin, 70 Mich. 6, 37 N. W. 888.

IV. Clairvoyance.

It has been held that the professional services of a medical clairvoyant are medical services for which the practitioner cannot re-

cover without a compliance with the statute providing that "no person, except a physician or surgeon who has received a medical degree . . . . or a license . . . . shall recover any compensation for medical services, unless previous to such services he has obtained a certificate of good moral character from the municipal officers of the town where he then resides": Bibber v. Simpson, 59 Me. 181. It has also been held that medicine in its ordinary sense, as applied to human ailments, means something administered inwardly or externally in the treatment of disease, though it need not necessarily be of such character as to be seen or handled, and a physician is one whose profession is to prescribe and administer such medicine. Hence a statute regulating the practice of medicine may include "medical clairvoyants" who visit sick patients, examine their condition, determine the nature of their disease and prescribe the remedies deemed most appropriate: Kansas City v. Baird, 92 Mo. App. 204. One who holds himself out to the public as a clairvoyant physician is bound to treat patients with the ordinary care, skill and knowledge of the physicians of a regular school in good standing practicing in that vicinity, although the clairvoyants, not having any fixed principles or formulated rules for the treatment of disease, cannot be regarded as constituting a school of medicine: Nelson v. Harrington, 72 Wis. 591, 7 Am. St. Rep. 900, 40 N. W. 228. As demonstrating in what the clairvoyant treatment of disease consists and the liability of the practitioner we quote from the last cited case as follows: "The defendant is what is known as a clairvoyant physician, and held himself out, as other physicians do, as competent to treat diseases of the human system. He did not belong to, or practice in accordance with the rules of any existing school of physicians governed by formulated rules for treating diseases and injuries, to which rules all practitioners of that school are supposed to adhere. The testimony shows that his mode of diagnosis and treatment consisted in voluntarly going into a sort of trance condition, and while in such condition to give a diagnosis of the case and prescribe for the ailment of the patient thus disclosed. He made no personal examination, applied no tests to discover the malady, and resorted to no other source of information as to the past or present condition of the patient. Indeed, he did not profess to have been educated in the science of medicine. He trusted implicitly to the accuracy of his diagnosis thus made, and of his prescriptions thus given. . . . . Clairvoyant physicians have a common mode of acquiring their knowledge of cases, but their methods of treatment may be contradictory and as numerous as are the practitioners, and no principle or rule of clairvoyant treatment be violated thereby. The proposition that one holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient, and treats him for disease, may, because he resorts to some peculiar method of determining the nature of the disease and the

remedy therefor, be exonerated from all liability for unskillfulness en his part, no matter how serious the consequences may be, cannot be entertained. The proposition, if accepted as true, would, as already suggested, contravene a sound public policy. It matters not that the patient, or those who are responsible for him, know the methods of the practitioner. The responsibility for malpractice must still be laid upon the latter": Nelson v. Harrington, 72 Wis. 591, 7 Am. St. Rep. 902-904, 40 N. W. 228.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

COMMONWEALTH v. SHORTALL.

[206 Pa. St. 165, 55 Atl. 952.]

MARTIAL LAW Exists, Though in Time of Peace, whenever the military arm of the government is called into service to suppress disorder and restore the public peace. (p. 764.)

MARTIAL LAW, Declaration of, What is.—An order of the governor of the state declaring that in a specified district turmoil and riot frequently occur and mob law reigns, and that the civil authority is unable to maintain order and has called on him for troops, and directing the major general to place an entire division on duty to protect men who desire work, to arrest all persons engaging in acts of violence or intimidation, and hold them under guard until their release will not endanger the public peace, and to preserve the public peace and good order upon all occasions within the district specified, establishes qualified martial law therein, and puts it in force only for the preservation of the public peace and order, but not for the ascertainment or vindication of private rights or the other ordinary functions of the government. (p. 764.)

MARTIAL LAW—Supremacy of the Military Over the Civil Authorities, When and to What Extent Established.—It is not true that a community must be either in a state of war or of peace, and that there is no intermediate state. When the civil authority, though in existence and operated for some purposes, is yet unable to preserve the public order, and resorts to military aid, this necessarily means a supremacy of actual force; and if the governor intervenes as supreme executive, he or his representative becomes the superior or commanding officer, and the civil authority is subordinate to the military to whatever extent may be necessary in the discretion of the military commander. (p. 765.)

THE EFFECT OF MARTIAL LAW is to put into operation the powers and methods vested in the commanding officer by martial law. As to the preservation of order and security of life and property there is no limit, but the necessities and exigencies of the situation. In this respect there is no difference between a public war and a domestic insurrection. (p. 765.)

MARTIAL LAW—Accountability of Military Commander.—In war, the military commander is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved. (p. 766.)

MARTIAL LAW—Military Authorities may Act upon Appearances.—In determining responsibility for acts, the courts proceed upon principles of law applicable to issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. When the exigency does not admit of delay, and there is reasonable or probable cause for the belief that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a less extreme course might have been pursued with safety. (p. 767.)

MARTIAL LAW—Rights of the Military Though There is No Actual War.—Where the military are in actual service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. (pp. 767, 768.)

MILITARY LAW—Protection to a Subordinate or Private Soldier.—A subordinate stands in a different position from his superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. (p. 768.)

MARTIAL LAW.—A Private Soldier is Justified in Shooting and Killing one who disregards an order to halt, three times repeated, where the order of the commanding officer requires such action in such circumstances, and it is clear that the shooting was not influenced by malice. (pp. 770, 771.)

HABEAS CORPUS—Discharge of Private Soldier upon.—Where the shooting and killing of a citizen by a private soldier is in pursuance of orders given, and the circumstances are such that if he were placed on trial for murder, the court would direct his acquittal or set aside his conviction, he will be discharged on habeas corpus before trial. (pp. 771, 772.)

Petition for habeas corpus on behalf of the relator, Arthur Wadsworth, against a constable who held him in custody under a warrant of arrest for homicide. The application was heard before Judges Mitchell, Dean, Fell, Brown, Mestrezat and Potter.

Frederic W. Fleitz and John F. Whalen, for the commonwealth.

M. P. McLaughlin, district attorney, and George Dyson, for the respondent.

167 MITCHELL, J. A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Penn-

sylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation not only of men but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property and killing of nonunion workmen became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them.

Among the places where the disorder was greatest was Shenandoah in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia and subsequently on further call, the entire division of the National Guard, on October 6, 1902, by General Order No. 39.

The text of this order which is important is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the governor and commander in chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The major general [168] commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and through-

out the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the 18th Regiment, being part of the troops under command of Brigadier-General Gobin, was stationed in and near Shenandoah. Several houses occupied by nonunion men had been dynamited and attempts made upon others. On October 8th, therefore, General Gobin issued the following order: "At 5:30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company "A" of the 18th Regiment, in service there, and in the evening of October 8th was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due [169] warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house and called "Halt!" The man continued to advance toward the gate. Wadsworth called again "Halt!" The man continued to advance. Wadsworth then touched the door and said "Corporal of the guard." He then called "Halt!" and again "Halt!" The man by this time had opened the gate and was coming into the yard, when Wadsworth, in accordance with his orders, fired and the man, whose name was afterward found to be Durham, fell to the ground dead.

A coroner's inquest was held and the jury found that "the shooting was hasty and unjustifiable" and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wads-

worth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of habeas corpus was allowed by the presiding justice of this court, and the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail, pending the argument of the case.

These are all the material facts and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered but staggered back several steps after the shot was fired.

The issue of General Order No. 39 by the governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or at least, according to the more moderate advocates of that view, not in time of peace. Thus in Ex parte Milligan, 4 Wall. 2, 127, it is said in the opinion of the majority of the court, "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But in the dissenting opinion in the same case, Chief Justice Chase convincingly [170] distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures on American Constitutional Law, page 930: "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection; and being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary

course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned, the difference is one of terms rather than of substance, and is material chiefly in regard first to the jurisdiction of courts-martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war, or secondly, to the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it [171] was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and

operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security and calls upon the sheriff with the posse comitatus, the latter becomes the responsible officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. So too if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods.

[172] The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities, would be to make the government contemptible and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to sub-

ject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation": Hare's American Constitutional Law, lect. 42, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the posse comitatus and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply [173] when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law": Hare's American Constitutional Law, lect. 41, p. 906.

This last quotation illustrates and explains the difference in the application of the term "martial law" which has given so much apparent trouble to some of the text-writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in

domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge Hare in the quotation supra, an "offshoot of the common law which though ordinarily dormant in peace, may be called forth by insurrection or invasion": See Respublica v. Sparhawk, 1 Dall. 357; Mitchell v. Harmony, 13 How. (U. S.) 115; Ford v. Surget, 97 U. S. 594, and English cases cited in 2 Hare's American Constitutional Law, chapter 41.

In determining the responsibility for such acts, the courts proceed [174] upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety": Hare's American Constitutional Law, 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterward that it was false or erroneous will not make him a trespasser": Taney, C. J., in Mitchell v. Harmony, 13 How. 115.

And while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be adjudged by the standard of actual war. No other standard is possible, for the first and overruling duty is

to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator, in regard to responsibility, [175] we find the law well settled. "A subordinate stands as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point, a soldier or member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances": Hare's American Constitutional Law, 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the Articles of War, article 59, under the acts of Congress, officers or soldiers charged with offenses punishable by the laws of the land, are required (except in time of war) to be delivered over to the civil (i. e., in distinction from military) authorities; and the courts proceed upon the principles of the common (and statute) law: United States v. Clark, 31 Fed. 711. The decisions therefore are precedents applicable here.

A leading case is United States v. Clark, 31 Fed. 710. A soldier on the military reservation at Fort Wayne had been convicted by court-martial and when brought out of the guardhouse with other prisoners at "retreat," broke from the ranks and was in the act of escaping when Clark, who was the ser-

geant of the guard, fired and killed him. Clark was charged with homicide and brought before the United States district judge, sitting as a committing magistrate. Judge Brown, now of the supreme court of the United States, delivered an elaborate and well-considered opinion, which has ever since been quoted as authoritative. In it he said: "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then, after referring to the common-law principle that an officer having custody of [176] a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code which practically abolish the distinction between felonies and misdemeanors, he continued: "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In McCall v. McDowell, 1 Abb. U. S. 212, Fed. Cas. No. 8673, where an action was brought by plaintiff against General McDowell and Captain Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is placed in a dangerous dilemma of being liable to damages to third persons for obedience to the order or for the loss of his commission and disgrace for disobedience thereto. . . . . Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should protect the inferior, leaving the responsibility to rest where it

properly belongs, upon the officer who gave the command." The court sitting without a jury accordingly gave judgment for Captain Douglas, though finding damages against General McDowell.

In United States v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner who was sergeant of the guard, Woods, J., afterward of the supreme court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire [177] whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if on the other hand the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In Riggs v. State, 3 Cold. 85, 91 Am. Dec. 272, the supreme court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation as already shown was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary.

The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground therefore for doubt as to the legality of the order to shoot. The relator was a private soldier and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not [178] know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs where mere spectators and even distant non-combatants get hurt without apparent fault of their own.

Whenever a homicide occurs it is not only proper but obligatory that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts therefore are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield in Mostyn v. Fabrigas, 1 Cowp. 161: "The question of probable cause in this as in most other instances, is one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause": Hare's American Constitutional Law, 919.

In United States v. Clark, 31 Fed. 710, already cited, Mr. Justice Brown said: "It may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them, ... but as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (Gosline v. Place, 32 Pa. St. 520) has the authority and the duty on habeas corpus in favor of a prisoner [179] held on a criminal charge, to see that at least a prima facie case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed and on them the law is clear and settled. If the case was before a jury we should be bound to direct a verdict of not guilty and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

MARTIAL LAW OTHER THAN IN TIME OF WAR.*

I. Nature and Effect of Martial Law.
II. Difference Between Military and Martial Law.
III. Effect of Martial Law upon Civil Law.
IV. Liability for Willful or Oppressive Acts.
V. Suspension of the Writ of Habeas Corpus.

I. Nature and Effect of Martial Law.

The nature and effect of martial law are clearly and concisely pointed out in In re Egan, 5 Blatchf. 319, Fed. Cas. No. 4303, where it is said: "All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country within the confines of its powers, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drumhead court-martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious." To the

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*REFERENCE TO MONOGRAPHIC NOTE.

Martial law: 92 Am. Dec. 180.

same effect see Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; United States v. Diekelman, 92 U. S. 520; In re Ezeta, 62 Fed. 972.

In Winter v. Dickerson, 42 Ala. 92, and Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159, the courts quote an observation of Sir Matthew Hale to the effect that martial law is, in truth and reality, no law, but something indulged rather than allowed as a law.

Unquestionably, a state, in order to put down an armed insurrection, too strong to be controlled by the civil authority, may call out its military force: Luther v. Borden, 48 U. S. (7 How.) 1, in which case Chief Justice Taney said: "The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands." Its use has also been justified upon the principle of self-defense, the same as when employed among individuals: In re Boyle, 6 Idaho, 609, 96 Am. St. Rep. 286, 57 Pac. 706; Griffin v. Wilcox, 21 Ind. 370.

In order that martial law be put into operation it is not necessary that an actual state of war exist between nations or different factions of the same country, but if there be civil disturbance or resistance to the execution of the laws that is sufficient: Davis on Military Law, 303; and the entire military force of the nation may be called out to enforce its laws: In re Debs, 158 U. S. 564, 15 Sup. Ct. Rep. 900.

II. Difference Between Military and Martial Law.

There is a well-defined and recognized distinction between military law and martial law. The former applies to those rules enacted by the legislative power for the government and regulation of the army and navy, and the militia when called into the active service of the United States, while the latter applies to that government and control which military commanders may lawfully exercise over the persons and property of citizens and individuals not engaged in the land or naval service: Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; In re Kemp, 16 Wis. 359.

III. Effect of Martial Law upon Civil Law.

An interesting question presents itself as to how far martial law and civil law are inconsistent with each other. In Winter v. Dickerson, 42 Ala. 92, the court quotes with approval from the opinion of Attorney General Cushing, where he says that martial law suspends, for the time being, all of the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander; that the civil law is suspended, or at least made subordinate, and its place is taken by martial law under the supreme, if not the direct, administration of the military power.

Martial law is exercised, the military being on the spot to execute it, where no civil authority exists, but where it does exist, it is

held in Griffin v. Wilcox, 21 Ind. 370, that the constitution is imperative that it shall be paramount of the military.

In Ex parte Milligan, 71 U. S. (4 Wall.) 2, Mr. Justice Davis, writing the opinion, said: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"

A minority opinion was filed, which is discussed in Johnson v. Jones, 92 Am. Dec. 181, where it is said: "The opinion of the minority was to the effect that martial law was not necessarily limited to time of war, but might be exercised at other periods of 'public danger,' and that the fact that the civil courts are open is not controlling against its exercise, since they 'might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty.' This opinion of the minority has been considered the sounder and more reasonable one: 2 Winthrop on Military Law, 38. And the opinion of the majority has been otherwise criticised as confusing martial law with military government: Pomeroy's Constitutional Law, sec. 714; 2 Winthrop on Military Law, 39."

That martial law is not inconsistent with the administration of justice between citizens in the civil courts, such courts being authorized by the military power to exercise their functions, see Kimball v. Taylor, 2 Woods, 37, Fed. Cas. No. 7775.

In Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675, it is said: "Under the constitution and laws of the United States, the President has a right to call, or cause to be called, into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power exercised here by his delegate has placed all the citizens subject to militia duty under military authority and under military law. That I conceive to be the extent of the martial law,

beyond which all is usurpation of power. In that state of things, the course of judicial proceedings is certainly much shackled, but the judicial authority exists and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of habeas corpus, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice generally should be stopped; for, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases."

IV. Liability for Willful or Oppressive Acts.

The existence of martial law does not authorize general military license, or place the lives, liberty or property of the citizens of the state under the unlimited control of every holder of a military commission: Despan v. Olney, 1 Curt. 308, Fed. Cas. No. 3822. If the power is exercised for the purposes of oppression, to gratify malice or to inflict willful injury upon person or property, the party by whom, or by whose order, it is committed, will be held responsible: Luther v. Borden, 48 U. S. (7 How.) 1; In re Ezeta, 62 Fed. 972.

In Despan v. Olney, 1 Curt. 308, Fed. Cas. No. 3822, a military officer, who had acted under orders of the commanding general, was sued for arresting and confining the plaintiff. The state was then under martial law, and the defendant pleaded a statute which barred all actions, for acts done while the state was under martial law, provided such acts were intended to preserve the peace, and to aid the people and government against the open or suspected hostility of the person complaining. Issue was joined upon the averment of the plea that the act in question was done with that intent. Judge Curtis instructed the jury, in part, as follows: "It is enough to say that, under the issue you are trying, the existence of martial law is not, of itself, a justification of the defendant. He must also satisfy you that the act done by him, under that law, was intended by him to preserve the peace of the state, and to aid the existing government, and not from recklessness, or a love of power, or to gratify any bad passion. Still, the fact that martial law existed has a most important bearing on the question of the intent of the defendant. He held a commission as captain. He received an order from his commander. He was bound to obey all lawful orders. And if this order was one which, upon its face, was lawful, and he did no more than execute it, you will consider whether it would not be proper to conclude that he acted simply with an intent to do his duty, unless some other intent appears. Now, as martial law existed, and as Major General Anthony had authority under that law, for sufficient cause known to him, to cause the arrest of the plaintiff, the order to do so was, upon its face, a lawful order. And I do not think the

defendant was bound to go behind an order, thus apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this would be destructive of military discipline, and of the necessary promptness and efficiency of the service."

V. Suspension of the Writ of Habeas Corpus.

The suspension of the writ of habeas corpus has frequently arisen under martial law during actual warfare, but there are few decisions arising from the suspension of that writ under martial law, established to suppress civic disorders. It has been held that martial law and the privilege of this writ are wholly incompatible with each other: Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4761.

In re Boyle, 6 Idaho, 607, 96 Am. St. Rep. 286, 57 Pac. 706, it appeared that in one of the counties of Idaho, bodies of armed men defied the execution of the laws, and committed deeds of violence, and the civil authorities of the county were not able to control them. The question arose whether, under these circumstances, the writ of habeas corpus could be suspended. This the court answered in the affirmative, saying: "We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued. The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does, and has, existed, in Shoshone county for the past six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the military of the state, or of the federal government, to suppress such insurrection, and re-establish permanently the ascendency of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary."

In Ex parte Moore, 64 N. C. 802, it was held that where, under the laws of a state, power was given the governor to declare a county to be in a state of insurrection, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, he had no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. The uprisings there mentioned were due to the Ku-Klux-Klan, who terrorized certain counties of that state shortly after the close of the Civil War.

RHYMER v. FRETZ.

[206 Pa. St. 230, 55 Atl. 959.]

A PUBLIC NUISANCE cannot be Suppressed at the Suit of a Private Individual unless he has sustained some damage or injury which is clearly special to himself, and apart from that which the general public sustains. (p. 778.)

PUBLIC NUISANCE—Erection and Maintenance of a Building, When cannot be Enjoined at the Suit of a Private Person.—The erection of a frame building on a public street which jeopardizes the safety of property in the vicinity from fire, and in the neighborhood of which there is an unlawful gathering of persons, whereby plaintiff and his neighbors are deprived of the full enjoyment and use of their property and homes, is a public nuisance. Hence, it will not be enjoined at the suit of a private individual. (p. 779.)

George E. Nitzsche and George F. Deiser, for the appellant.

James S. Clifford, for the appellee.

231 MESTREZAT, J. James L. Rhymer, the plaintiff, owns and resides on the premises at No. 1732 North Front street, in the city of Philadelphia. Pursuant to an ordinance of the select and common councils of the city, approved November 8, 1892, granting him permission, Tobias L. Fretz, the defendant, erected a frame building to be used for religious purposes, on the lots at Nos. 1731 and 1733 North Front street, directly opposite the premises and residence of the plaintiff. By a subsequent ordinance, approved February 18, 1901, the ordinance of November 8, 1892, was amended so as to authorize Fretz to enlarge the frame building he had erected. After the defendant had begun the work, authorized by the amended ordinance, the plaintiff filed this bill against him as superintendent of Gospel Mission, 1731 and 1733 232 North Front street, to restrain him "from continuing the erection upon said premises of said frame structure." The bill avers that "since the erection of the original frame building upon the premises the Gospel Mission has been the resort of disreputable characters who congregate in the neighborhood and are a nuisance to the peace and safety of this neighborhood, various acts of nuisances have been committed within the past six months, and the frame structure has been partially diverted from its high religious purpose by the maintenance of a sawmill and woodyard, and for the purpose of operating the same, a boiler and engine are used." The reason assigned for the relief prayed for is found in the seventh paragraph of the bill, and is "that the erection

of said frame structure and the uses to which it is being put, viz., the working of a sawmill and woodyard and the operating of a steam boiler and engine will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood will deprive himself (the plaintiff) and his neighbors of the full enjoyment and proper use of their property and home." The court below entered a decree "that a permanent injunction issue restraining the defendant from erecting the building authorized by the ordinance of 1901." The entry of this decree is the subject of the sixth assignment of error.

It is well-settled law that a public nuisance cannot be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to himself and apart from that which the general public sustains. Mr. Wood in his work on Nuisances, third edition, section 646, citing numerous authorities to sustain the text, states the rule as follows: "An individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot fairly be said to be a part of the common injury resulting therefrom. It is not enough that he has sustained more damage than another; it must be of a different character, special, and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." In Mechling v. Kittanning Bridge Co., [233] 1 Grant Cas. 416, Lowrie, J., speaking for this court said: "Private citizens have no right of action, either in law or equity, for the suppression of a public nuisance, unless on averring and proving some special damage to themselves. . . . . For a nuisance that is merely a public wrong, only a public action can be brought, and that must be done by the proper public functionaries."

Applying this rule to the facts averred in the bill it is clear that the court below could not give the plaintiff the relief he seeks. His only complaint is that the erection of the building and the uses to which it will be put "will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood, will deprive himself and his neighbors of the full enjoyment and proper use of their property and home." In this averment there is no allegation that by the construction and use of the building the plaintiff will sustain any damage

special to himself, or that his property will be subjected to any other or greater danger than that of his neighbor. The danger from fire and the deprivation of the enjoyment and use of property are, therefore, as alleged in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. In fact there would be greater danger to the property on the same side of the street and immediately adjacent to the Mission building than to the residence of the plaintiff. As appears from the bill this "is a residential neighborhood of valuable private houses," and hence, the property in the entire neighborhood, being of the same character, will be jeopardized to the same extent and degree as that of the plaintiff which is his private residence. This is a fact not only averred in the bill but found by the learned trial judge in his fourth finding of fact as follows: "That the erection of a frame building in the location authorized by the ordinance of councils would increase the danger of fire to the residences and other buildings in the immediate neighborhood, including that of the plaintiff."

We are of opinion that the bill avers no facts showing any [234] danger or injury likely to result from the erection of the proposed structure which is special to the plaintiff and not common to all the property owners in the vicinity, and that, therefore, it was error to grant the injunction at the instance of the plaintiff restraining the defendant from erecting the building.

The sixth assignment of error is sustained, the decree is reversed, and it is ordered that the bill be dismissed at the cost of the appellee.

A Public Nuisance can be suppressed at the the suit of a private individual if he suffers a special injury which is real and distinct from that suffered by him in common with others, but not otherwise: Roberts v. Mathews, 137 Ala. 523, 34 South. 624, 97 Am. St. Rep. 56, and cases cited in the cross-reference note thereto; Dennis v. Mobile etc. Ry. Co., 137 Ala. 649, 35 South. 30, 97 Am. St. Rep. 69, and cases cited in the cross-reference note thereto. As to the right of property holders to an injunction against the erection or removal of wooden buildings, see Griswold v. Brega, 160 Ill. 490, 52 Am. St. Rep. 350, 43 N. E. 864; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434; Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333.

McCOLLUM v. CARLUCCI.

[206 Pa. St. 312, 55 Atl. 979.]

PARTNERSHIP—Action at Law for the Wrongful Dissolution of.—If one of the partners breaks the covenants of a partnership and thereby wrongfully causes its dissolution, the other may maintain an action of assumpsit against him for the damages resulting. (p. 781.)

PARTNERSHIP—Causing Wrongful Dissolution, What Acts Amount to.—If one of the members of a partnership advises its employés to bring suits against it, and to obtain judgments under which its property is sold to the partner doing such wrong, and secures a lease of the property with which the partnership was conducted, and judgment on it for the nonpayment of rent, and operates a rival business close by, he is guilty of producing a wrongful dissolution of the partnership for which his partner is entitled to recover damages in an action at law. (p. 781.)

DAMAGES, Measure of for Wrongful Dissolution of a Partnership.—The measure of damages in an action by one partner against the other for the wrongful dissolution of a partnership to operate a stone quarry under a lease, is not the value of the quarry, nor is it the plaintiff's share of the profits, but the value of the articles of partnership to him at the time of the wrongful dissolution. (p. 782.)

Action of assumpsit for the breach of a partnership agreement. The trial judge was asked to rule that the action could not be sustained, but refused to do so, and the jury returned a verdict in favor of the plaintiff for four thousand dollars, but the court required him to remit all but eighteen hundred dollars. The defendant appealed.

G. P. Little, W. W. Watson, R. B. Little and S. L. Tiffany, for the appellant.

A. H. McCollum, for the appellee.

314 BROWN, J. If this suit were for an accounting by Carlucci, the appellant, to the estate of Lord, his late partner, the judgment would have to be reversed. Partnership accounts must be adjusted and settled and the liability of one partner to another ascertained by an action of account render or by a bill in equity: Ferguson v. Wright, 61 Pa. St. 258; Leidy v. Messinger, 71 Pa. St. 177; Crow v. Green, 111 Pa. St. 637, 5 Atl. 23; Murray v. Herrick, 171 Pa. St. 21, 32 Atl. 1125.

The cause of action, as set forth in plaintiff's statement, is, that the appellant broke all of his covenants in the partnership agreement, and this suit is not for an accounting, but for damages resulting to Lord from the dissolution of the partnership,

wrongfully brought about by the bad faith and broken promises of Carlucci. In other words, the claim of Lord's estate is not for a share of the profits of the business which he and Carlucci, by their agreement of December 2, 1899, were to carry on, nor is it for an accounting from Carlucci as a partner. The contention of the plaintiff below was, that, as a result of the broken promises of Carlucci, the partnership was wiped out and profits that might have come from the business were never realized. If Carlucci had kept faith with Lord and the partnership had continued, whether profitable or unprofitable, the accounts between the partners would have to be settled in the 315 regular way. The finding of the jury has sustained Lord's contention that the partnership was wrongfully dissolved by Carlucci, and the representatives of his estate are not asking for an accounting, but for damages resulting from Carlucci's broken covenants and wrongful dissolution of the partnership. The remedy for the wrong sued for is neither an action of account nor bill in equity, but is in assumpsit on the broken contract: Addams v. Tutton, 39 Pa. St. 447.

The jury were instructed by the learned trial judge, first, that before Lord could recover, it was incumbent on him to show he had performed all of his covenants and had been willing to go on and work the quarry and pay one-half of the debts and expenses; and, secondly, that the evidence would have to satisfy them that Carlucci had wrongfully dissolved the partnership. Without referring to the testimony in detail, it is sufficient to say that a careful examination of it has persuaded us that the jury were justified in their finding that Lord had performed his covenants, and that Carlucci had not only not done so, but had willfully and wrongfully dissolved the partnership. As evidence of his willful purpose to wrongfully force the dissolution, the court, under Addams v. Tutton, 39 Pa. St. 447, properly allowed the plaintiff to show that the defendant had advised the men who had been employed by the firm to bring suits against it, obtain judgments and sell out the partnership property, which he himself purchased; that he said the partnership was at an end; that he obtained an assignment of the lease of the quarry to Lord as well as of the farm on which the quarry was located, and entered judgment against Lord for default in payment of rent and issued execution on it; that he purchased the farm, and, with a new partner, opened a quarry close to the Lord quarry and was operating it at the time of the trial; and that, when Lord sold stone to get money to

pay the men, he notified the parties to whom stone had been sold not to pay him.

We have discovered no error in any of the rulings on offers of evidence, and the only other question is as to the correctness of the court's instructions on the measure of damages, which were: "Now, as to the value of this contract, you cannot go to work and evolve prospective profits, and figure up what should be the speculative profits in the future, but the [316] question is, What was that contract worth to Mr. Lord? That is the measure of damages. Not what it would sell for, but what was it worth? That is something which is very hard to determine. In the first place, we think, if he dissolved the contract wrongfully, without any cause, he should be required to pay nominal damages for its dissolution and whatever actual damages Mr. Lord sustained by reason of it. Those damages are not the value of the quarry. What would this firm make out of the quarry in running it? If they both ran it and performed the covenants of this lease, was there any profit in running it? If so, that was the share of the profits of Mr. Lord, the plaintiff? But you cannot figure up his share of the profits and say that is the actual damages. You will take the value of the contract, itself; arrive at it by such method of figuring as you can, and determne what was the value of this article of copartnership to Mr. Lord at the time of the dissolution of the contract. That is the basis upon which you are to work in awarding damages. . . . . In ascertaining the value of the partnership, of course you may take into consideration what was done there that year—the business that the partnership did—and ascertain as best you can what the value of that partnership was to Mr. Lord, if any, provided you find that Mr. Carlucci wrongfully dissolved the partnership, and render your verdict in a gross sum for the amount that you shall find that he was damaged, with interest from the date of the damage sustained, or from the dissolution of the firm, up to this date." It would have been difficult for the court to have given more definite instructions under the testimony in the case, and as the defendant did not ask anything more definite, the charge on that point ought not to be complained of.

The verdict was for four thousand dollars. On a motion for a new trial, the careful judge, feeling that the damages were in excess of what was warranted by the evidence, and that the jury might have, to some extent, misunderstood the instructions as to the measure of damages, reduced the verdict of eighteen

hundred dollars. There was evidence that Lord had made about two thousand dollars above expenses in operating the quarry the year before he entered into the contract with Carlucci; and, in the exercise of its discretion in disposing of the rule for a new trial, the limit in reducing the verdict was reached by the court below. As the case was [317] fairly and properly tried, under adequate instructions to the jury, and no injustice has been done to the appellant, in view of the reduced verdict, the judgment entered below is affirmed.

A Partner dissolving the partnership with unfair designs is liable to his copartners for damages suffered thereby: Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Corcoran v. Sumption, 79 Minn. 108, 79 Am. St. Rep. 428, 81 N. W. 761.

NORRIS v. CROWE.

[206 Pa. St. 438, 55 Atl. 1125.]

EQUITY—Adequate Remedy at Law, When Exists.—If a party having a right to ground rents of a definite, specified amount enters into an agreement through a mistake of law, whereby he consents to the reduction of that amount, he has, if the agreement is conceded to be affected by such mistake, an adequate remedy at law against such agreement by bringing an action for such rents, and when the agreement is produced against him, proving the mutual mistake of law by the parties. (p. 785.)

EQUITY—Mistake of Law, Relief from.—Ignorance or mistake of the law, with a full knowledge of the facts, is not per se a ground for equitable relief. Hence, if a person entitled to a ground rent of six per cent, believing, through his ignorance of the law, that it is redeemable, enters into an agreement to accept five per cent, equity will not relieve him from the agreement. (p. 789.)

Suit in equity to cancel an agreement for the reduction of ground rents. The trial judge refused the bill and the complainant appealed.

John G. Johnson and Horace M. Rumsey, for the appellant.

No paper-book filed or argument offered for appellee.

[444] DEAN, J. In this appeal appellee has given us no aid by filing a paper-book and we are left to dispose of the issue by the presentation of appellant's side of it and on the carefully considered opinion of the learned judge of the court below. The facts are about as follows: On December 7, 1866, the trus-

tees of the Norris estate conveyed to Rev. James Crowe, minister of the Ninth Presbyterian congregation of Philadelphia, a lot of ground on the corner of Hancock street and Susquehanna avenue, reserving thereout a yearly six per cent ground rent of three hundred and forty dollars. Afterward, in 1893, the Reverend Crowe conveyed the property to his congregation which at that date had become incorporated. By proceedings, in partition of the estate of Isaac Norris, Sr., in 1867, this particular ground rent became the property of Dr. Isaac Norris, this appellant. J. Parker Norris, his brother, was in 1891 his attorney in fact, and in that year a committee of the church corporation called upon and notified him, that unless the ground rent was reduced from six to five per cent the congregation would pay it off. Both parties assumed that the ground rent was redeemable and therefore could be paid off at the option of the lot owner. It was agreed that the reduction to five per cent should be made, but that the option should not be exercised for five years; thereupon, the following agreement in writing, signed and sealed, was executed:

"That in consideration of the said Isaac Norris, M. D., not demanding more than five per cent interest on a certain annual ground rent reserved by deed dated December 7, 1866, the said the Norris Square United Presbyterian Church doth hereby agree that they will not pay off the principal of the said ground [445] rent until the expiration of five (5) years after the first day of July, 1891, and the said Isaac Norris, M. D., doth hereby promise and agree that he will not, at any time, ask, demand, or sue for more than five per cent interest on said ground rent so long as the said church continues to pay the same with reasonable punctuality."

The case of Palairet v. Snyder, 106 Pa. St. 227, appeal from common pleas, No. 1, of Philadelphia, had been decided by this court in 1884. The reservation of ground rent in that deed was substantially the same in terms as in the one before us, and we held the ground rent was irredeemable; although that case had been the law for seven years both parties were ignorant of it. The congregation thereafter continued to pay the ground rent at five per cent as stipulated in the agreement and Norris continued to accept the same without objection until January 28, 1901, when Norris discovered the decision in Palairet v. Snyder, 106 Pa. St. 227, and concluded that his ground rent was irredeemable; he at once demanded from the congregation six per cent and on refusal to pay brought assumpsit in common

pleas, No. 4, of Philadelphia. To this the congregation filed an affidavit of defense denying liability for more than five per cent and averring the stipulation in the agreement as limiting liability to that amount. While the record of the action at law stood in this condition, on January 10, 1902, Norris filed this bill, praying that the agreement be declared void and that it be delivered up for cancellation on the ground that it was entered into under a mistake as to the law by both parties, and further, specially praying that defendant be enjoined from setting it up as a defense in the action of assumpsit. The defendant demurred on the grounds that an action at law involving the same matter was then pending and that on the face of the bill plaintiff had no equity of which a court of equity would take jurisdiction. The court below sustained the demurrer and dismissed the bill, first, because plaintiff had an adequate remedy at law; and second, because the mistake of law was one which under the facts averred in the bill, equity would not relieve against.

We think that plaintiff had an adequate remedy at law. He had brought his action in assumpsit and defendant had filed affidavit disclosing fully its defense, based on the agreement. [446] At the trial plaintiff would have offered his deed of 1886 to Reverend Crowe reserving his six per cent ground rent; defendant would then have put in evidence the agreement of June 13, 1891; plaintiff would then have replied with evidence of mutual mistake of the law by the parties; it would then have been for the court to interpret the agreement and declare its effect in view of the undisputed evidence and to have directed a verdict. Why would not this have been an adjudication of the very issue raised by this bill and demurrer? It is suggested that it would not have been an adequate or convenient remedy because suits could still have been brought in the future for each six per cent annual ground rent as it fell due. We do not think so; the judgment would have been res adjudicata as to whether the ground rent was five or six per cent. If plaintiff had won, he could have brought suit for six per cent and defendant could have defended only on proof of payment of that rate; but if defendant had won and plaintiff had sued for six per cent, plaintiff would have lost his case; obviously one suit at law would have ended litigation. We think the remedy at law was both adequate and convenient, and that the court below might properly have dismissed the bill on this ground alone.

But probably because the same question would have had to be determined in the action at law, that is, the effect of the agreement made under a mutual mistake of law the court saw fit to go further, and determine whether on the facts the plaintiff should in equity be relieved from the consequence of it. The maxim, "Ignorantia legis neminem excusat," undoubtedly applies where the ignorance is of a well-known rule of law, or as it is sometimes stated, ignorance of a general rule of law; but where the ignorance of the law is specially applicable to the determination of a private right, and the ignorant party complains because he has been prejudiced by the contract, it does not follow that equity will in all cases afford relief. By simply filing a demurrer, of course, the defendant admits the material averments of the bill and the material averment is, that the agreement was prompted by a mutual ignorance of the law as applicable to reservations of ground rent in the terms incorporated in this deed, both parties acting in the belief that this ground rent was redeemable, whereas in law it was not. [447] Will equity under these facts afford plaintiff relief from the consequences of his ignorance of the law? Under what circumstances and as to what contracts the maxim would be enforced seems to have been first fully discussed by this court in Good v. Herr, 7 Watts & S. 253, 42 Am. Dec. 236, in an elaborate opinion by Rogers, J. In that case a childless man died intestate possessed of a large estate in land, leaving a widow, two uncles and an aunt living, and children of two uncles who were dead. The widow accepted one of the purparts of the land at the valuation of twenty thousand dollars and entered into recognizance to pay to all persons entitled thereto their respective shares. She paid to each of the brothers and the sister living one-fifth and to the children of each deceased brother as representing their fathers per stirpes onefifth. All parties believed at the time that the payments were in accord with the law of descent; all were ignorant that the two uncles and aunt were entitled to the whole and the nephews and nieces to nothing. All on receiving the money executed releases to the widow. One of the surviving brothers having, after receiving the money and executing the release, died, his administrator discovered that instead of one-fifth he had been entitled to one-third and brought suit against the widow for the difference. When she set up the release, he sought to avoid it by showing mutual ignorance of the law of descent by all parties; each being of the belief that the children were entitled to the shares

of their parents. There was no question but that at the time of the distribution all parties were ignorant of the law and that was the only fact on which the release could be treated as void. By sustaining it the surviving brothers and sister lost two-fifths of the estate; by declaring it void the widow would have had to pay over again the two-fifths paid to the nephews and nieces.

There was no serious hardship in the case; the estate remained in the family of the dead brother; his brothers and sister got a fraction less than the law allowed them; the nephews and nieces a fraction more. It was a case of ignorance of the law alone and this court declined to set aside the release. In the opinion, the court cites a number of authorities from the supreme court of the United States, as well as Story's Equity Jurisprudence in support of the rule, that mere ignorance of the law itself is no ground for relief in equity and concludes thus:

448 "We grant that, where there is a mistake of a clear, well-established and well-known principle of law, whether common or statute law (for in this respect we can conceive no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise or confidence abused, but it is obvious that, in such cases, the mistake itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to impinge the general rule. We are therefore of the opinion that in no case is ignorance or mistake of the law, with a full knowledge of the facts, per se, a ground for equitable relief."

Justice Rogers admits that there are rare exceptions to the rule and we concede that the trend of decisions in our state has been to multiply the exceptions as witness: Heacock v. Fly, 14 Pa. St. 540; Peters v. Florence, 38 Pa. St. 194; Gross v. Leber, 47 Pa. St. 520; Whelen's Appeal, 70 Pa. St. 410; Goettel v. Sage, 117 Pa. St. 298, 10 Atl. 889; Wilson v. Ott, 173 Pa. St. 253, 51 Am. St. Rep. 767, 34 Atl. 23, and perhaps others; but in each of the cases cited the relief granted was not based solely on the ground of ignorance of the law; but there were in addition circumstances of great hardship resulting from the ignorance, or, in addition to the mistake of law, facts pointing strongly toward fraud or undue influence, yet which would not have been so certainly established as to warrant setting aside the contract.

Notwithstanding the remarks of McCollum, C. J., in Wilson v. Ott, 173 Pa. St. 253, 51 Am. St. Rep. 767, 34 Atl. 23, the last case cited, tending to throw doubt on the continued existence of the rule in Good v. Herr, 7 Watts & S. 253, 42 Am. Dec. 236, yet it will be noticed he cites Good v. Herr and distinguishes it from the one before him. What he says in disparagement of the rule is based on an essay in the American Jurist, and was not necessary to a decision of the case before him and therefore to some extent is dicta. The case before him was a "hard" case in which if the contract had been enforced according to law the defendant would have been compelled to pay four thousand dollars for a title they did not get, a case of gross hardship clearly constituting it an exception to the rule; therefore no assault on the general rule was necessary. This is the Pennsylvania case on which appellant seems to most confidently rely. But nevertheless, we adhere to that rule as the law of this commonwealth, that [449] is, "In no case is ignorance or mistake of the law with a full knowledge of the facts per se a ground for equitable relief."

If the evidence shows that in addition there would be great hardship in enforcing the contract made in ignorance of the law, equity may afford relief. But between the border of great hardship and actual fraud there are many contracts made in ignorance of the law, yet which result in no inequitable consequences from the enforcement of the general rule. In such cases the rule should be enforced. The principle of the inviolability of contracts made with a full knowledge of the facts, and where there has been no overreaching or serious injury, should not be disturbed for slight reasons. There are very few cases where the title of a grantee of land has failed that the failure is not the result of ignorance of law by the grantee or of his counsel; the ignorance may only be demonstrated in a subsequent judicial trial, yet the legal theory is, that the law as announced at the trial was always the law though its first promulgation may have been only at that particular trial.

But a case directly in point is decided by the supreme court of California in Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137. In this case a contract was entered into by both parties under the belief that the law had been established by a decision of the supreme court made some time before. Clearly, both parties entered into the contract under the view of the law as announced by the supreme court. Sometime after, the court overruled its decision in the first case, and an action was

brought to set aside the agreement on the ground that it had been made because of a mutual mistake of law. The court refused to disturb the contract saying: "Indeed the weight of authority in the United States is, that mistakes (of law), unless accompanied with special circumstances, such as misrepresentation, undue influence or misplaced confidence, constitute no ground for relief."

In the case before us there was no new law announced relating to contracts, in Palairet v. Snyder, 106 Pa. St. 227, of which plaintiff might easily have been ignorant. That case only announces a law old as English law, that is, that where the grantee of land by deed covenants to pay annually forever an [450] annual rental of a certain sum of money, unless, within ten years he pays the full purchase money for the land, and he fails to pay the purchase money within the ten years, the annual rental becomes perpetual. It only promulgates the old law that parties are bound by their contracts; it would have been new law if this court had decided they were not. This, however, was the law of which plaintiff was ignorant; by reason of his ignorance, in an agreement under seal, he made a reduction of one per cent in the annual rental because he believed if the reduction was not made defendants would pay the principal; the only reasonable inference is, because his investment at five per cent was better than he could get elsewhere. No misrepresentation as to the law was made to him by anybody; law-books and lawyers were thick around him but he did not take the trouble to inquire; he was induced to enter into the bargain because of its profit to him. It is just as profitable now, for while the legal rate of interest is six per cent, the commercial rate is five or less. As he avers, the ignorance of the law was mutual; if plaintiff had not entered into the agreement, defendants, in equity and good conscience, could then and there have paid off and extinguished the ground rent; by their mistake that opportunity was lost; by his mistake he has lost nothing that he expected to make by the bargain. We can see no hardship in this contract which should move a chancellor to reach forth his hand and destroy it.

As to the question of want of consideration, the plaintiff suffers no hardship from his contract which will move equity to rescind it; the contract then is in full force; it met the approval of plaintiff when he signed it; he got the consideration he demanded. The seal imports a consideration; on its face the contract expresses one; therefore, as long as equity

refuses to abrogate it, it must be taken to be what it purports to be, a good contract in law.

The decree of the court below is affirmed and the appeal is dismissed at costs of appellant.

A Mistake of law will not ordinarily be relieved against. This rule however, is subject to modification to meet exceptional cases: See Sunkler v. McKenzie, 127 Cal. 554, 78 Am. St. Rep. 86, 59 Pac. 982; monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 497-507. At pages 506, 507, of this note, it is said that a contract entered into by parties under a mutual supposition that the law affecting the subject of the contract is in accordance with a previous decision of the supreme court upon a similar state of facts will not be set aside because of a subsequent decision overruling the former one, and declaring a different rule upon the subject.

CUNNIUS v. READING SCHOOL DISTRICT.

[206 Pa. St. 469, 56 Atl. 16.]

CONFLICT OF LAWS.—The Regulation of the Title and Devolution of Property within its limits is within the control and jurisdiction of the state. (p. 791.)

CONFLICT OF LAWS.—The Rules of Evidence for the Ascertainment of Facts in Its Courts are within the control and jurisdiction of the state. (p. 791.)

CONSTITUTIONAL LAW—Statutes Providing for the Administration of the Estates of Persons Who are Presumed to be Dead.— A state may authorize its courts to grant letters of administration on the estate of a person supposed to be dead on account of his absence for seven or more years, and to declare that such letters, until revoked, and all acts done in pursuance of them or in reliance thereupon shall be as valid as if the supposed decedent were really dead. (p. 792.)

CONSTITUTIONAL LAW—Right of the State to Provide for the Ascertainment of the Title to Property.—A state is not bound to have the regular and lawful use of property left subject to restrictions and uncertainty where the owner so absents himself from the state that he is presumed to be dead. If a fair and reasonable provision is made for the protection of his rights in case of his reappearance, the state has not exceeded its constitutional powers. (p. 796.)

CONSTITUTIONAL LAW—Right of the State to Provide for the Disposition of Property of Persons Who are Presumed to be Dead.—A statute authorizing administration on the estate of a person supposed to be dead, and providing that no distribution shall be made of his property until security is given, approved by the court, for refunding, with interest, in case he shall be in fact alive, and in case of the inability to give such security, the money shall be invested under the control of the court, is not invalid as authorizing the taking of property without due process of law, though there is no personal service on the absentee. (p. 797.)

Action by Margaret Cunnius against Reading School District to recover property. The trial court gave judgment for the plaintiff, which was affirmed by the superior court, and the defendant appealed.

Frederick W. Nicholls, for the appellant.

Caleb J. Bieber, for the appellee.

[470] MITCHELL, J. The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the state.

The rules of evidence for the judicial ascertainment of facts in its courts, and as a corollary, the establishment of legal presumptions, are also within the control and jurisdiction of the state.

Bearing these two axioms in mind, let us examine the act of 1885 which is involved in the present case. It provides that whenever application shall be made for letters of administration on the estate of any person supposed to be dead on account of absence for seven or more years, the register of wills shall certify the application to the orphans' court, and that court, if satisfied that the applicant would be entitled to such letters were the supposed decedent in fact dead, shall cause advertisement to be made of the application, and on the day fixed shall "hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof." If upon such hearing the court shall be satisfied that the legal presumption of death is made out, it shall so decree, and forthwith cause notice to be published in a newspaper of the proper county, "and also when practicable in a newspaper published at or near the place beyond the commonwealth [471] where when last heard from, the supposed decedent had his residence." At the end of twelve weeks from the last insertion of this notice, if no contrary evidence be forthcoming, the court may order the register to issue the letters of administration, and the said letters until revoked, and all acts done in pursuance thereof, and in reliance thereupon, shall be as valid as if the supposed decedent were really dead." It is further provided that the orphans' court may at any time revoke the letters on proof that the supposed decedent is in fact alive, whereupon the administrator shall file his account and turn over the property to the owner, who may also recover any moneys or property received by any person as widow, or next of kin, or heir. And for protection of the owner as to such persons it is required that

no distribution shall be made to them until security is given approved by the court, for refunding with interest in case the supposed decedent shall in fact be alive, and in case of inability to give such security the money shall be invested under the control of the court, and the interest only paid to the distributee. Section 6 contains provisions as to suits by or against the administrator, and the substitution of the supposed decedent after revocation of the letters. This section will be referred to later on.

From this summary it appears that the act establishes a system, carefully wrought out with due regard to all rights involved, for the administration of estates or property whose owner is legally presumed to be dead, but whose death cannot at the time be proved with absolute certainty. It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a caretaker and to vest the present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the state must have some such power is manifest. The property is within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding [472] is unimpeachable. But if he be dead, so far as can be learned, though death be not absolutely proved, yet, the effect to the state is the same, there is property in its charge without a recognized owner. It must have power to meet such a case or one of its chief functions as a government must go unperformed.

The consequences of a different view are too serious to be disregarded. If an intruder enters on land of the absentee and holds open and hostile possession for twenty-one years, the absentee's title will be gone. So as to personal property of which another holds or acquires wrongful possession for six years. And in the meantime how is the heir or the next of kin, who so far as can be known is the real owner, to assert his right or prevent his title from slipping away before his eyes, unless he may rely upon the presumption? Unless the state can appoint a representative of the unknown owner, whether called administrator, curator or other name is immaterial, such

owner's interests must go unprotected. And in appointing such representative the state must be allowed to act upon the presumption, for that is all that can be had in the case. Unless the statute in giving such authority clearly violates rights or transgresses constitutional restrictions, it is our duty to sustain it.

The superior court held the act unconstitutional as depriving plaintiff of her property without due process of law, under the fourteenth amendment of the constitution of the United States. In so holding the court felt itself bound by the decision of the supreme court of the United States in Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108. If that case really governs the present we must, of course, render willing obedience to its supreme authority. But we do not so regard it. The exact point there decided was that a sale by an administrator appointed under a state law for a person who had been absent, unheard of, for seven years, but who was in fact alive, passed no title even to an innocent purchaser. The ground of the decision was that the probate court had no jurisdiction to appoint an administrator for a person who was alive, and there being no jurisdiction over the subject matter, the appointment of an administrator [473] and all the acts done under such appointment were void. This is in entire accord with our own decision in Devlin v. Commonwealth, 101 Pa. St. 273, 47 Am. Rep. 710, which is cited approvingly by Mr. Justice Gray in his opinion. "The estate of a person supposed to be dead is not seized or taken into custory of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he be living or dead, but only upon the question whether and to whom letters of administration shall issue. The local law on the subject . . . . does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate, therefore, subject to be administered and disposed of by the probate court. On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate": Scott v. McNeal, 154 U. S. 47, 14 Sup. Ct. Rep. 1113. "Under such a statute, according to the overwhelming weight of authority as shown by the cases cited in the earlier part of

this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans' court, or court of the ordinary or surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that he is dead, and are null and void if he is alive": Scott v. McNeal, 154 U. S. 48, 14 Sup. Ct. Rep. 1113. The cases referred to in this extract are numerous, but are founded on the same view that the essential jurisdictional fact for the action of the probate court is the death of the party whose estate is in question. This, as already said, is in exact conformity with our own case of Devlin v. Commonwealth, 101 Pa. St. 273, 47 Am. Rep. 710, and with it we have no question.

But our act of 1885 is wholly different in intent and effect. It was passed less than three years after the decision in Devlin v. Commonwealth, 101 Pa. St. 273, 47 Am. Rep. 710, and is an effort to supply the remedy that such a state of facts as the present requires. Its primary purpose as appears from the preceding summary of its [474] provisions, is not distribution, but conservation of the estate, through the medium of an officer clothed with authority to protect and enforce the rights of the unknown owner, the absentee if alive, his legal successors if he be dead. The statute did not create the presumption of death, that we inherited with our common law. The probate court in Pennsylvania, in the sense in which it is understood in the cases previously referred to, is for ordinary cases, the register of wills whose jurisdiction as held in Devlin v. Commonwealth, 101 Pa. St. 273, 47 Am. Rep. 710, depends on the fact of death. But when a case arises of presumption of death from absence, a question of fact is presented, which is essential to the determination of the rights in property whose owner is thus shown to be doubtful. Express jurisdiction is given by the act of 1885 to the orphans' court to inquire into and determine judicially that fact. This provision at once takes the case out of the ruling in Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, and the line of authorities on the same principle, and puts it in the class of Allen v. Dundas, 3 Term Rep. 125, where payment to the executor in a forged will was held good, because the appointment of the executor was a judicial act by a competent tribunal within its jurisdiction, and though incorrect in fact, as subsequently shown, it was valid until regularly rescinded or reversed,

and could not be attacked collaterally. The objection, therefore, that the court in the present case was without jurisdiction over the subject cannot be sustained.

We have still to consider whether the statute is open to further objection as not due process of law for want of personal service on the absentee. This depends on whether the proceedings under it are regarded as purely in personam or as at least quasi in rem. The leading authority on this point is Pennoyer v. Neff, 95 U. S. 714. It was there held that a general judgment against a nonresident obtained by constructive service by publication is void and a sale under it passes no title. But it was also clearly held that as to property within the jurisdiction of the state, judgments which are substantially directed against such property even though in form in personam are valid to that extent. "It is true," says Mr. Justice Field, "that in a strict sense a proceeding in rem is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual [475] claimants; but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings in rem in the broader sense which we have mentioned."

The proceedings under the act of 1885 conform fully to this standard. The primary object as already said, is the due and orderly conservation of property for the benefit of the unknown or uncertain owner; for present but restricted use by those who appear to be owners, with a saving of the rights of the former owner should it subsequently appear that he is the true owner still. If the statute had provided solely for the latter alternative, and vested a public administrator or other official with authority to collect and preserve the assets for the absentee exclusively, there could be no reasonable objection by the absentee for the whole proceeding would be in his interest. Thus in the present case plaintiff has a dower interest charged on land, but if she had stayed away twenty-one years it would have been lost, for the statute of limitations would have barred a recovery notwithstanding her absence during that time. But a statutory administrator has been paid part of it, and so far as appears still has it in hand or secured for her benefit. That

is in aid of her right and in no sense in violation of it. But there must be a limit beyond which the state is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the state and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The state is not bound to have the regular and lawful use and ownership of property subject to such restrictions and uncertainty. If a fair and reasonable provision is made for protection of the owner in case of his reappearance the state has not exceeded its constitutional powers. Such provision, as already shown, is made by the act, under which no distribution can be made without security for reimbursement to the owner should he be shown to be alive. And the permissive use of the income or the property [476] itself in the meantime by those who upon the only evidence obtainable appear to be the actual present owners does not render the protection insufficient. Temporary use is a matter clearly within the state's power of regulation. The unreasonableness of any other view may be illustrated by the present case. Appellant has paid the charge at least in part to the administrator who has the money in hand or secured awaiting plaintiff's claim, yet the latter, without resorting to that fund, or proceeding under the statute, demands that defendant shall pay a second time for a mispayment which was plaintiff's own fault.

Returning for a moment to Pennoyer v. Neff, 95 U. S. 714, there is another suggestion applicable to the authority of the state. "We do not mean to assert," says Mr. Justice Field, "that a state may not authorize proceedings to determine the status of one of its citizens toward a nonresident, which would be binding within the state though made without service of process or personal notice to the nonresident." And this he illustrates by the case of divorce. But if the state has power to determine in this manner the status of its citizens as to whether married or not, it surely has equal power to determine the status of its citizens in respect to property, that of the absentee as to whether he is alive or dead, and that of the resident as to whether he is real owner or only next of kin.

One other consideration is applicable to the present case. The plaintiff was a citizen and resident of this state. She chose to disappear, leaving no trace for eleven years. She was bound to know the law. The state has power to make rules of property, and all owners are bound to conform and abide by

them. It might treat absence for seven years as ipso facto an abandonment, and deal with it accordingly. The plaintiff legally knew that if she stayed away twenty-one years the statute of limitations would bar her claim against the defendant, and the reasons for her absence whatever they were would not stop that result; the act of 1885 was in force when she went away and she was equally bound to know that under its provisions the presumption of death might be established and acted upon. By staying away she should be held to have accepted the provisions of the act as a sufficient protection to her rights.

477 Section 6 of the act, as already mentioned, deals with the subject of suits by the administrator and against him as the representative of the supposed decedent. So far as it may be held to authorize a judgment which shall have the effect of a general judgment in personam against the latter, it may be obnoxious to the constitutional objection that it is not due process of law. It will be time enough to decide such questions when they arise. But even if so much of that section may be void it will not affect the general validity of the act.

Upon this branch of the case therefore we conclude, first that the appointment of an administrator was a judicial act by a competent tribunal having jurisdiction of the subject matter, and therefore cannot be attacked collaterally, but is valid until revoked by direct proceedings as prescribed in the statute. And, secondly, that as the proceedings are substantially in rem, for the conservation of property within the jurisdiction of the state, they are due process of law and the act is constitutional.

The learned judge of the common pleas did not take the same view as the superior court upon the constitutionality of the act, but he held it to be ineffective by reason of certain defects or objections. The principal of these were, first, the failure to provide for a suitable bond to be given by the administrator, and therefore the impossibility of exacting security from him; secondly, the absence of provision for vacation of the administration and the carrying out of the testator's directions in case a will is found, whether made before or after the grant of letters; thirdly, the absence of provision for revocation of the administration except on "proof that the supposed decedent is in fact alive, i. e., at the date of the application for revocation"; fourthly, the provision for refunding bonds is only on the same contingency that the decedent shall in fact be alive; and lastly that the act furnishes no power or rule for adapting the practice

prescribed by other general statutes in pari materia to the purposes of this one, or for devising new methods suitable to their accomplishment.

The difficulties thus pointed out are not insuperable, nor are any of them serious enough to invalidate the act. Where the intent of a statute is plain and its administration is committed to a court of known and established jurisdiction and methods [478] under prior laws on similar subject matters, such court is authorized to adapt its ordinary forms to the new requirements, or to devise and employ new ones of analogous kind suitable to carrying out the intent of the act. The orphans' court is such a court in regard to this statute. It exercises jurisdiction over the general subject of decedents' estates and the testamentary and administrative agents in regard to them, and has very ample chancery powers in that regard. The intent of the act of 1885 is plain. When it speaks of an administrator it means an administrator under its own provisions, and the bond and security to be given by him must be such as will conform to the intent. The court has full power to so modify the ordinary form of administrator's bond as to execute the intent of the act. Secondly, a will supersedes administration previously granted not merely because of the terms of the bond but by force of its superior authority, and there is no difficulty in applying the same principle under this act whether the will be made before or after the letters issued. In the same way any apparent difficulty in regard to revocation, and the taking of refunding bonds before distribution is easily obviated. The language of the act is that the court "may revoke the said letters at any time on due and satisfactory proof that the supposed decedent is in fact alive." The reasonable construction of this provision in order to carry out the plain purpose of the act is that revocation may (i. e., shall) be made at any time on proof that the supposed decedent is alive then, or was alive at any previous time which ought to work a revocation. Mere proof that he was alive at a subsequent date, whether a month, or a year, or more, later than the issue of letters, but had not been further heard of, might not make any such change of circumstances as to require revocation, while positive proof of his death would properly do so and lead to the issue of new letters in the ordinary course of administration. As already said, none of these difficulties are insuperable, and the details may be safely left to be worked out practically as they arise. There are none of them presented in this case.

Judgment reversed and record remitted to the court of common pleas with directions to enter judgment for the defendant non obstante veredicto.

A Statute authorizing the estate of a living person, because of his absence for a certain time without being heard from, to be administered upon as if he were dead, is held unconstitutional in Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9. See, in this connection, the monographic note to McClymond v. Noble, 87 Am. St. Rep. 358-368; Parish v. East Coast Cedar Co., 133 N. C. 478, ante, p. 718, 45 S. E. 768.

IN RE COOPER'S ESTATE.

[206 Pa. St. 628, 56 Atl. 67.]

REAL ESTATE, Conversion of into Personalty by Will, Time of.—Conversion takes place from the death of the testator only when there is a positive direction to sell. (p. 800.)

REAL ESTATE, Conversion of into Personalty by Will, What Necessary to.—To work a conversion of the testator's land into money from the time of his death, there must be a positive direction to sell, or an absolute necessity to sell to execute the will, or such a blending of real and personal estate by the will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath such fund as money. (p. 800.)

REAL ESTATE, Conversion of into Personalty, When does not Take Place.—A direction in a will to lease the testator's farm, if it can be done to advantage, otherwise to sell it at public or private sale at such time as the executor shall deem expedient, does not operate to convert the farm into personalty until the executor exercises his power of sale. (p. 801.)

ESTATES OF DECEDENTS—Creditors' Right to Payment Out of Real Property of by Loss of Lien.—Where the indebtedness of a decedent ceases to be secured by a lien on his real estate because two years have elapsed without the holder of the indebtedness bringing suit thereon, they are not entitled to the sale of realty under a power given in the will to payment from the proceeds. (p. 801.)

Exceptions to the report of an auditor sustaining objections to the application of the proceeds of the sale of certain real property to the payment of debts. The proceeds of the testator's personal property had been applied to the payment of obligations given without consideration. The exceptions were dismissed by the trial court, and an appeal was taken by the creditors who claimed to be entitled to payment out of the proceeds of the realty.

B. F. Junkin and Grafton Junkin, for the appellant.

W. N. Seibert and Charles H. Smiley, for the appellees.

[630] BROWN J. Josiah K. Cooper, the testator, died July 26, 1898, and the controlling question raised on this appeal is whether, by the terms of his will, there was a conversion of his real estate from his death, or from September 21, 1900, the time it was sold by his executor. The clauses in the will from which it must be determined when the conversion took place are: "Third. I direct that my farm be leased if the same can be done to advantage, otherwise I direct that my executor shall sell the same at public or private sale, at such time as he shall deem it expedient so to do, and I hereby authorize and empower him to make good and sufficient deed for conveying the same to the purchaser. Fourth. I give and bequeath to my wife, Annie Cooper, the one-half of all proceeds from my estate arising from real or personal effects when the same is sold. She to have the one-half of the proceeds of the farm during the term of any lease thereof. This bequest to be in lieu of all dower, right of dower and exemption. Fourth. I give and bequeath all the rest and residue of my estate or the proceeds thereof to Mary J. Linn, of Connelsburg, Mahoning county, Ohio, Geo. A. Cooper, J. D. Cooper, Samuel C. Cooper, Frederick S. Cooper, and Harry Cooper, Elam Cooper, sons of Andrew Cooper, deceased, share and share alike."

Conversion takes place from the death of the testator only when there is a positive direction to sell. If, as was said in Hunt's and Lehman's Appeals, 105 Pa. St. 128, and subsequently repeated in Irwin v. Patchen, 164 Pa. St. 51, 30 Atl. 436, anything ought to be settled by this time, it is that, in order to work a conversion of a testator's land into money from the time of his death, there must be either—"1. A positive direction to sell; or 2. An absolute necessity to sell in order to execute the will; or 3. Such a blending of real and personal estate by the testator in his will as to clearly show that [631] he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money." "The direction to sell must be absolute and unconditional": Stoner v. Zimmerman, 21 Pa. St. 394. "To establish a conversion, the will must direct it absolutely, or out and out, irrespective of all contingencies": Anewalt's Appeal, 42 Pa. St. 414; and, "unless there be an imperative direction to sell, irrespective of contingencies and independent of discretion, conversion will not take place until the sale is actually made: Anewalt's Appeal, 42 Pa. St. 414; Henry v. McCloskey, 9 Watts, 145"; Peterson's Appeal, 88 Pa. St. 397. "It must not rest in the discretion of the

executor, nor depend upon contingencies": Jones v. Caldwell, 97 Pa. St. 42. "It must be imperative, not contingent or discretionary merely, or a conversion does not take place until the sale is actually made": Mellon v. Reed, 123 Pa. St. 1, 15 Atl. 906.

In the case before us there is no positive direction to sell. It is in the alternative. The first and positive direction is that the farm be leased, and no limitation is put upon the time for which it is to be leased. It is to be leased if it can be leased to advantage, that is, so long as it can be leased to advantage, and only "otherwise," that is, when the executor can no longer lease it to advantage, is it to be sold. It might have been leased to advantage during the lifetime of the widow, and she would have received one-half of the proceeds during that period; and there is no direction to sell at her death. The sale which the executor was authorized to make depended upon a contingency which might never have happened. The testator may have thought that his farm would have to be sold, but he gave no unconditional direction to sell it, and it might have been leased to advantage indefinitely. As there was no conversion under a positive direction to sell, so there was no absolute necessity to sell in order to execute the will, for the leasing of the farm during the lifetime of the widow and giving her one-half of the proceeds during life would have carried out the provisions of the will. Nor does the intention of the testator clearly appear that, from the time of his death, there should be such blending of his real and personal estate as to create a fund out of both to be bequeathed to the legatees as money, for such a blending depended entirely upon whether or not the alternative direction to the [832] executor to sell should be carried out. There were to be no proceeds from the sale of the farm, unless the same should be sold after it was learned that it could not be leased to advantage. The conversion of the testator's farm took place, therefore, when, in the exercise of the mere discretion reposed in the executor, to be exercised only on a certain condition, it was sold on September 21, 1900—more than two years after the death of the testator.

As there was no conversion of the farm until September 21, 1900, the notes given to the appellees ceased to be liens upon it on July 26, 1900, when two years had expired from testator's death. It is not necessary for us to consider the purpose for which the appellant alleges these notes were given, for, even

if in each instance they were executed and delivered by the decedent for a valuable consideration, and represented his bona fide indebtedness, they ceased to be liens upon his real estate at the expiration of two years from his death, because the holders had not, as required by the act of June 8, 1893 (Pub. Laws, 392), brought suits upon them. If, after July 26, 1900, the testator's land was discharged from all liability for the payment of these notes, the proceeds of a subsequent sale of it were not bound by them; and if after that date, the holders of the notes could not have looked to the land, how can they turn to the purchase money for payment? The notes may have represented debts of the testator, for which his land was liable at the time of his death, and would have continued so, if the statute had been followed; and his personal estate might have been indefinitely held for their payment, but the proceeds of the sale of his farm, at the time it was sold, formed no part of his estate, real or personal. The land itself had been freed from the obligation of his unsecured debts on July 26, 1900, and whatever took its place was equally absolved. In Kerper v. Hoch, 1 Watts, 9, and Commonwealth v. Pool, 6 Watts, 32, in passing upon a statute similar in its provision to the act of June 8, 1893, it was held that the limitation annexed to the lien of a debt of the decedent on his lands was not exclusively for the security of purchasers, but that heirs and devisees were equally the objects of the act's protection; and, in reannouncing this rule, there is no reason why it should not include the legatees of the proceeds of land sold after the liens of the debts of the decedent [633] upon it had expired; for it, as owners of the unconverted land, it could not be taken from them, they ought not, in reason, to be deprived of the proceeds of it when converted into money. As to the claims of the appellees upon their respective notes, we repeat what was said in Cake's Estate, 157 Pa. St. 457, 27 Atl. 773: "The insuperable difficulty, in the way of the rejected claims is that they had ceased to be liens on the land, from the sale of which the fund in question was raised. Assuming them to have been valid claims against the estate of the intestate and therefore liens on the real estate of which he died seised, they were not liens thereon at the time the sale was ordered, and therefore not entitled to participate in the distribution."

What we have said as to the time when there was a conversion of the real estate of the testator, and as to the immunity of the proceeds of the sale of it from liability for his common

debts, disposes of the questions raised by the five assignments of error. In the printed argument there appears a schedule of distribution, which we are asked to approve, but, instead of doing so, we reverse the decree below and remit the record, that the exceptions to the account of J. D. Cooper, executor of the last will and testament of Josiah K. Cooper, deceased, may be disposed of and distribution made in accordance with this opinion, the costs of this appeal to be paid out of the fund in the hands of the accountant.

The Doctrine of Equitable Conversion is the subject of a monographic note to Ford v. Ford, 5 Am. St. Rep. 141-148. See, also, the subsequent cases of Crouse v. Peterson, 130 Cal. 169, 80 Am. St. Rep. 89, 62 Pac. 475; Estate of Mustin, 194 Pa. St. 437, 75 Am. St. Rep. 702, 45 Atl. 313; Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675, 24 S. E. 202; Green v. Green, 50 S. C. 514, 62 Am. St. Rep. 846, 27 S. E. 952; Hite v. Hite, 93 Ky. 257, 40 Am. St. Rep. 189, 20 S. W. 778; Phillips v. Ferguson, 85 Va. 509, 17 Am. St. Rep. 78, 8 S. E. 241; Eneberg v. Carter, 98 Mo. 647, 14 Am. St. Rep. 664, 12 S. W. 522. It is said that equitable conversion does not occur unless there is an imperative direction in the will that land shall be converted into money, or money into land: Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558. But, see the note to Ford v. Ford, 5 Am. St. Rep. 143-145. There must be an absolute intention and direction that the conversion is to be made; but it is not essential that an express declaration to that effect be made in the instrument, for it may arise by necessary implication from the nature of the instrument or the language used: Haward v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503. The testator's intention is the determining factor: Note to Ford v. Ford, 5 Am. St. Rep. 142. As to the effect of a power of sale as working a conversion, see McHugh v. McCole, 97 Wis. 166, 65 Am. St. Rep. 106, 72 N. W. 631; Rudy's Estate, 185 Pa. St. 359, 64 Am. St. Rep. 654, 39 Atl. 968; Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446.

CASES

IN THE

SUPREME COURT

OF

VERMONT.

WILKINS v. STILES.

[75 Vt. 42, 52 Atl. 1048.]

JUDGMENT upon the Merits, What is.—If it appears that evidence was offered and received in support of the plaintiff's claim, and, after considering it, that the court adjudged that the evidence was insufficient, and for that reason that the action be dismissed and the defendant recover his costs, this is a judgment on the merits. (p. 805.)

JURISDICTION.—A court which has jurisdiction of a cause of action of the character and amount sued upon cannot be held to be without jurisdiction to proceed, on the ground that a previous action on the same cause in a court of competent jurisdiction had resulted in a judgment against the plaintiff. (p. 806.)

A WRIT OF PROHIBITION is not Available for the Correction of an Erroneous Decision, unless it operates as an unwarranted assumption of jurisdiction. (p. 806.)

PROHIBITION to Prevent Disregard of the Rule of Res Judicata.—A writ of prohibition does not lie to prevent a court from proceeding upon a judgment on the ground that the court rendering it disregarded evidence which showed that the plaintiff was estopped from maintaining the action by a final judgment against him in another court of competent jurisdiction, though because of the absence of any right of appeal, the defendant has no means of relief from the erroneous judgment against him. (pp. 807, 808.)

Petition for a writ of prohibition, which was denied, and the petitioner appealed.

May & Simonds, for the relator.

C. C. Frye, for the respondents.

[43] MUNSON, J. The relator seeks to prohibit further proceedings in an action wherein judgment was rendered against him by Albert Worcester, a justice of the peace. He concedes that if Justice Worcester had jurisdiction over the claim or matter in suit at the time this judgment was rendered, his petition will not lie. But he claims that the jurisdiction which Justice Worcester would otherwise have had was taken away by proceedings previously had before David Frechette, another [44] justice of the peace. His claim, more specifically stated, is that the matter of the suit had been fully settled in the case decided by Justice Frechette; that the plaintiffs split their claim in bringing these suits; and that this was done to deprive the county court of its appellate jurisdiction.

Both actions were suits in trover for the conversion of the same two mileage books. The minute made by Justice Frechette upon the writ, after noting appearances, was as follows: "As the evidence in the case did not show to what degree the defendant damaged the plaintiff, and no malicious intent from the defendant, therefore the court adjudged that the case be dismissed, and that the defendant recover his costs." The relator insisted in the suit before Justice Worcester that the judgment in the first suit was a bar to that action, and plaintiffs' counsel then produced the record of that judgment as finally made up by Justice Frechette. This showed that the defendant moved "that the plaintiffs become nonsuited and the case be dismissed because the plaintiffs had not put in sufficient evidence as to the distance which the defendant was entitled to go upon said mileages whereby the court could assess damages," and that after hearing the arguments upon this motion the justice found that the evidence did not show to what degree the defendant damaged the plaintiffs, and that plaintiffs should therefore become nonsuited and the case be dismissed and the defendant recover his costs. Justice Worcester held upon inspection of this record that the prior judgment did not bar the proceedings before him, and rendered judgment for the plaintiffs.

The judgment rendered by Justice Frechette, although called in his record a judgment of nonsuit, is shown by that record to have been in fact a judgment upon the merits, and Justice Worcester erred in holding the contrary. It appeared from the record that evidence in support of the plaintiffs' claim [45] was introduced, and that the justice considered it, and gave judgment for the defendant because of its inadequacy. A jus-

tice judgment rendered upon such proceedings is necessarily a judgment on the merits, whatever its form, and upon whatever motion it is given: Smith v. Crane, 12 Vt. 487.

This brings us to the question whether Justice Worcester exceeded his jurisdiction in giving judgment for the plaintiffs in disregard of this prior adjudication. The case was certainly within his jurisdiction in the sense in which the subject is treated in Perry v. Morse, 57 Vt. 509; that is, he had jurisdiction of claims in trover to the required amount, and of the process before him, and of the parties named in it. It was also within his jurisdiction to construe the record of the former judgment when offered in evidence, and give it effect in reaching his decision. But he was led by a misconstruction of this record to give judgment upon a matter that had been previously adjudicated, and it is claimed that in rendering the judgment he acted without jurisdiction.

The general rule is that when a court has jurisdiction of the subject matter and the parties, the writ of prohibition is not available for the correction of its erroneous decisions. But when the erroneous decision is one which operates as an unlawful assumption of jurisdiction, prohibition may be had, as appears from Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36. So the question for decision is whether the error of law committed by Justice Worcester carried him beyond his jurisdiction.

In delivering the opinion in Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36, Judge Taft reviewed the decisions of different jurisdictions, many of which may seem from the brief statements there made to support the relator's contention, and some of which undoubtedly do support it. But near the close of the opinion, Judge Taft reminds the reader that this review was largely by way of illustration, [46] and that the case must not be taken as authority for anything beyond the exact point decided.

The general rule above stated is distinctly recognized in Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36, and one of the cases cited in that connection is Toft v. Rayner, 5 Com. B. 162, which is exactly in point here. The defendant was summoned before the county court in Cambridgeshire in an action for goods sold and delivered, and it appeared that the plaintiff had already recovered judgment against him in an action for the same debt in the borough

court of Cambridge, and that his goods had been seized and sold upon that judgment. The plaintiff recovered notwithstanding this, and the defendant sought to prohibit further proceedings, on the ground that, the matter being res judicata, the county court had no jurisdiction. The relator's counsel was asked how it could be said that the county court had no jurisdiction, and replied exactly in the line of the present argument, that it had jurisdiction of the matter at first, but that that jurisdiction ceased when the former judgment was shown. But the court said that the ground of the application was neither more nor less than that the county court, in deciding what it was competent for it to decide, made a mistake in point of law; and the writ was thereupon denied.

It is certain that the matter now complained of was not jurisdictional. The decision was not one by which the justice took unlawful cognizance of the subject matter or the parties. His jurisdiction of both was complete, and continued notwithstanding the record of the former suit. The production of that record merely raised a question incidental to the trial of his case. His erroneous decision of that question to the injury of the relator was a misfortune to which all suitors are liable in cases where no appeal is allowed to a higher court. The extension of the remedy of prohibition to such cases would lead to a review by this court of all unappealable cases where ignorance [47] of our decisions had led to the rendition of improper judgments.

This case is clearly distinguishable from Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36. There was in each case an erroneous disposition of a matter which the court had authority to determine; in one a disregard of the doctrine of res judicata, in the other a refusal to recognize the entirety of the claim. But the first was a decision which had no jurisdictional consequences; while the second gave the justice a final jurisdiction to which he was not entitled. The legislature has denied litigants the remedy of appeal when the matter in demand does not exceed twenty dollars, but has given them the remedy when the matter in demand exceeds that amount; and they cannot be deprived of this right by splitting an entire claim into sums below the statutory limit. The writ of prohibition was held available to prevent this—not because the decision was erroneous, but because the court thereby assumed an exclusive jurisdiction to which it was not entitled.

The decision now complained of was equally erroneous, but it worked no infringement of jurisdictional limits.

It is not necessary to examine the evidence upon which it is claimed in argument that this case presents a splitting of the claim that affected the final jurisdiction. The petition does not in terms allege, nor set forth facts which indicate, that there was a splitting of the claim, and that matter cannot be treated as in issue.

Petition dismissed with costs.

The Writ of Prohibition is discussed in the monographic note to State v. Commissioners, 12 Am. Dec. 604-611. It is not a writ of right, but its issuance is a matter of discretion. It is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress: Holly Shelter R. R. Co. v. Newton, 133 N. C. 136, ante, p. 701, 45 S. E. 549; State v. Jones, 2 Wash. 662, 26 Am. St. Rep. 897, 27 Pac. 452; Walcott v. Wells, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367. The writ of prohibition lies to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not legally vested, and to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised: Speed v. Common Council of Detroit, 98 Mich. 360, 39 Am. St. Rep. 555, 57 N. W. 406. It does not lie to prevent errors and irregularities, if the matter adjudged is within the jurisdiction of the tribunal: Bullard v. Thorpe, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36.

IN RE KNAPEN'S WILL.

[75 Vt. 146, 53 Atl. 1003.]

WILLS—Revocation by Attempted Alteration.—If a testator attempts to alter his will by interlining certain words and clauses and drawing lines through others, but not in such a manner that the alterations become effective as parts of his will, they do not amount to its revocation by cancellation. (p. 809.)

WILLS, Alteration of, Attempted, When Ineffective.—Interlineations in a will and new and independent bequests, all in the testator's handwriting, but without a new execution or attestation in the form required by law for an original will, are ineffective. (p. 811.)

WILLS—Revocation, Partial, When not Accomplished.—When a testator attempts to alter his will by striking out certain clauses, making bequests to certain persons, and interlining bequests in favor others, and there is also a general residuary clause, and the new or interlined bequest is not effective, the will is not revoked as to the bequest so stricken out or erased, because it is fairly inferable that he meant the revocation of it to be dependent on the taking effect of the interlineation. (p. 812.)

Lawrence & Lawrence, for the proponent.

Joel C. Baker, for the contestants.

[147] STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterward she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is three-fold—whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally [148] executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix's two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased"; and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was typewritten, and all the attempted changes made with a pen are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a request to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each, the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one-half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb"; and these words have been marked over with a pencil.

In the next clause but one a bequest of two hundred dollars has been changed by writing in ink the word "four" over

149 the word "two," and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? Vermont Statutes, 2354, following the English statute of frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation? The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from Warner v. Warner, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby canceled and annulled," and under the filing on the outside, "Canceled and is null and void. I. Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would 150 not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form: Wheeler v. Bent, 7 Pick. 61; Jackson v. Holloway, 7 Johns. 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every

cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation: Miles' Appeal, 68 Conn. 237, 36 Atl. 39. But if we should hold otherwise upon this point, as was done in Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret, thus coupling the cancellation of previous bequests, and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the [151] alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "canceled," but further wrote that he intended making another will, "whereupon I shall destroy this": In re Brewster, 6 Jur., N. S., 56, 29 L. J. P. & D. 69; Woerner's American Law of Administration, sec. 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause dehors the instrument: Hairston v. Hairston, 30 Miss. 276.

Jarman on Wills, volume 1, page 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal

effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations or cancellations that if they are made with the intention of substituting other words for those canceled, and such intention is frustrated, there is no revocation: Woerner's American Law of Administration, sec. 49; 1 Jarman [152] on Wills, 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix's handwriting, does not say with what intention they were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

The Revocation of Wills by Cancellation, alteration, and obliteration is discussed in the monographic notes to Graham v. Burch, 28 Am. St. Rep. 350-352; Bigelow v. Gillott, 25 Am. Rep. 35-37. In Howard v. Hunter, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638, where there was an attempted cancellation of a will, it is held that notwithstanding the intention of the testator, he cannot revoke his will except by writing signed and attested in the manner provided for the execution of the will itself. Compare Billington v. Jones, 108 Tenn. 234, 91 Am. St. Rep. 751, 66 S. W. 1127, and see Matter of Hopkins, 172 N. Y. 360, 92 Am. St. Rep. 746, 65 N. E. 173; In re Noon's Will, 115 Wis. 299, 95 Am. St. Rep. 944, 91 N. W. 670.

STATE v. BARRELL.

[75 Vt. 202, 54 Atl. 183.]

CRIMINAL LAW.—An Information may be Amended both in matters of form and in matters of substance. (p. 814.)

CRIMINAL LAW—Information, by Whom may be Amended.—The successor in office to the state's attorney who filed an information may amend it. (p. 816.)

Information for larceny under which the defendant was convicted. He appealed.

Gilbert A. Davis, for the respondent.

Herbert A. Blanchard, state's attorney, for the state.

203 WATSON, J. At the December term, 1902, of the county court in Windsor county, the state's attorney moved to amend the information which had been filed at the preceding term of court by his predecessor in office. The respondent objected thereto on the ground that, as the present state's attorney did not file the information he could not amend it. The objection was overruled pro forma, and the amendments were allowed and made, to which the respondent excepted. The case was then tried by jury, and a verdict of guilty rendered. The respondent moved in arrest of judgment for the insufficiency of the information. This motion was overruled, the 204 information adjudged sufficient, and judgment rendered on the verdict; to which respondent excepted.

That an information may be amended both in matters of form and in matters of substance is well settled (State v. White, 64 Vt. 372, 24 Atl. 250; State v. Hubbard, 71 Vt. 405, 45 Atl. 75); but it is contended that leave for that purpose can be granted only to the state's attorney who filed the information, because it is said to be under his oath of office; and that, his term of office having expired, the legal and proper course for the present state's attorney, if the information was defective in substance, was to enter a nolle prosequi, and then file a new information.

In England, at common law, the attorney general was the sole judge of what public misdemeanors he would prosecute, and he could file an information against anyone whom he thought proper to select, without oath or motion, and without any opportunity for the accused to show cause against the pro-

ceeding; and the conduct, continuance, suspension, and the dropping the prosecution were left entirely to his discretion: Chitty's Criminal Law, 345; 4 Blackstone's Commentaries, 309.

In this state there is no law requiring a state's attorney to make oath to an information filed by him. He is required to take the oath of office prescribed in the constitution; but it was held in State v. Sickle, Brayt. 132, that it was not necessary for him to state in an information that he informs under his oath of office. The oath of office under which he acts is for the faithful performance of his duties as such officer, but in no sense is it an oath to the truth of the allegations set forth in an information filed ex-officio by him, and it constitutes no obstacle in the way of amendments by any state's attorney who may have the matter in charge.

[205] Criminal informations are in the name of the state, and only the allegations of the state's attorney who exhibits them, and they are said by Mr. Chitty (1 Chitty's Criminal Law, 841), to be "analogous to declarations for the redress of a personal injury, except that the latter are at the suit of a subject for the satisfaction of a private wrong," and the former are "for the punishment of offenses affecting the interests of the public." Lord Comyn says (Comyn's Digest, tit. "Information"): "An information is a declaration of the charge or offense against anyone at the suit of the king." And in Rex v. Wilkes, 4 Burr. 2553, Lord Mansfield says: "An information for a misdemeanor is the king's suit. The title of the cause is 'The king against the defendant.' . . . . As a subject sues by attorney, so does the king, with a little variation of form for decency": See, also, State v. White, 64 Vt. 372, 24 Atl. 250.

It appears from Rex v. Wilkes, 4 Burr. 2553, that generally in England informations for misdemeanors of a public character were brought by the attorney general as an official right, but in case of his absence from the realm, disqualification, disability from sickness, or if the office of attorney general was vacant, the whole business and authority devolved upon the solicitor general, another of the king's counsel, and, except in the difference of his description, the form of the information was the same. In the case last cited, the office of attorney general being vacant, the information was exhibited by the solicitor general, and before the respondent pleaded, the solicitor general was made attorney general, and in that capacity brought into court the information he had filed as solicitor general. De-

siring to amend the information, he then directed one of the clerks in court for the crown to apply to a judge for such an order. On notice to the other side, and upon hearing before Lord Mansfield at chambers, the crown being represented by [206] the said clerk, and the respondent by his solicitor and his clerk in court, it was ordered: "Upon hearing the clerks in court on both sides, I do order that the information in this cause be amended," etc. And upon writ of error, it was held that the information was properly filed by the solicitor general, and that in thus permitting its amendment there was no error. Although the exact question before us was not involved in that case—the attorney general being the same person who as solicitor general had filed the information—yet the course therein pursued with the discussion and the holdings of the court is of great value; for it shows that in permitting the attorney for the crown to make such amendment, the fact that when he filed the information he was acting under some other official designation was immaterial. Whichever designation, he was the attorney for the crown in that case, and could be granted leave to make the amendment required, and a clerk for the crown could make the motion, and obtain the leave.

The case of Attorney General v. Henderson, 3 Anstr. 714, is very much in point. There the attorney general filed the information and the solictor general was permitted to amend it by adding another count.

In Michigan the assistant prosecuting attorney was authorized to perform only such duties as might be required of him by the prosecuting attorney, yet it was held in People v. Henssler, 48 Mich. 49, 11 N. W. 804, that in the absence of the prosecuting attorney, the person who in his stead appeared for the people (in that case the assistant prosecuting attorney) must, from necessity, have the power, with the permission of the court, to make amendments to the information.

We do not find that this question has before been passed upon by this court. But in State v. Meacham, 67 Vt. 707, [207] 32 Atl. 494, where the question was upon the sufficiency of the information upon demurrer, it is said in the opinion, per curiam, that owing to the views of the judges, no decision could be made regarding that question, but that inasmuch as the information of a state's attorney could be amended by his successor in office, both in form and in substance, the judgment would be reversed pro forma, and the case remanded to the county court to be proceeded with.

Although it does not appear that the question of a state's attorney's amending an information filed by his predecessor in office was before the court, the disposition of the case is significant in showing how the law regarding it was then understood.

Upon principle and authority we think a state's attorney may be permitted to amend an information filed by his predecessor in office; for the state is acting, and whether it is represented by the same attorney throughout the case, or by different ones in the same office, the law regarding amendments is the same.

The motion in arrest of judgment is based upon the information as it was before the amendments were made. No claim is made that it is insufficient as amended.

Judgment that there is no error in the proceedings of the county court, and that the responded take nothing by his exceptions. Let sentence be pronounced, and execution done.

The Amendment of Indictments is considered in State v. Cody, 119 N. C. 908, 56 Am. St. Rep. 692, 26 S. E. 252; Gannon v. People, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525. It has been held that an indictment cannot be amended without the concurrence of the grand jury by which it was found (State v. Sexton, 3 Hawkes, 184, 14 Am. Dec. 584), as by striking out the name contained in it and inserting another. But it is otherwise as to the amendment of mere informalities: McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124. And the caption is no part of the indictment: State v. McCarty, 2 Pinn. 513, 54 Am. Dec. 150. An indictment may be amended by the grand jury, with leave of the court, at any time before their finding is recorded and they have left the court: State v. Creight, 1 Brev. 169, 2 Am. Dec. 656. A statute authorizing the amendment of indictments to conform with the evidence is not unconstitutional: Miller v. State, 53 Miss. 403; Peebles v. State, 55 Miss. 434. See, too, People v. Kelly, 6 Cal. 210; Lasure v. State, 19 Ohio St. 43; State v. Manning, 14 Tex. 402; State v. Taylor, 118 N. C. 1262, 24 S. E. 526. That an information may be amended after the trial has begun, see State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

JANGRAW v. MEE.

[75 Vt. 211, 54 Atl. 189.]

ADVERSE POSSESSION—Notice in Words is not Necessary to Support Claim of.—It is sufficient that the occupation be open, notorious, and exclusive, and of such a character as would indicate to the owner that the occupancy was exercised as a matter of right. (pp. 817, 818.)

Ejectment. Verdict and judgment for the defendant, and the plaintiff appealed.

George W. Wing and John G. Wing, for the plaintiff.

T. R. Gordon and F. L. Laird, for the defendant.

[212] WATSON, J. This action was tried by jury resulting in a verdict for the defendant. Before judgment on verdict, the plaintiff moved to set aside the verdict on the grounds (1) that it was against the weight of evidence, contrary thereto, and not in accordance therewith; (2) that the northeasterly line of the plaintiff—the line in dispute—was conceded to start from a certain cedar post marking the westerly corner of defendant's land; and (3) that the evidence in the case had a tendency to show that the disputed premises had been used in common by the parties, and that the defendant's occupation had been by the plaintiff's permission, and not openly, notoriously, and exclusively adverse to him under a claim of right. The only question before us is on exception to the overruling of this motion.

The defense was placed upon the ground of title in the defendant both by record and by prescription.

The plaintiff claimed and the defendant conceded that the northeasterly line of plaintiff's lot—the line in dispute—started from a certain cedar post marking the westerly corner of defendant's land. The defendant's evidence tended to show that from the year 1875, she and her husband owned [213] and occupied the premises now owned by her adjoining the plaintiff's land until the husband's death about ten years ago, and that since then she has been the owner thereof and has occupied them in person or by her tenants; that when the defendant and her husband bought the place in 1875, the line between their land and the land now owned by the plaintiff was indicated on Loomis street by the cedar post, and that there was also a "line-board" on the barn; and that in 1879, and as late as 1887 and 1888, a common board fence was there on this line or portions of it. It is to this line thus indicated that the defendant claims to own. Her evidence tended to show occupancy of the disputed premises and to this line, by herself and husband until his death, and by herself or her tenants since; also uninterrupted, exclusive, open, notorious possession and acts of ownership for more than fifteen years exercised by them; and that the plaintiff never made any objection thereto, nor in acts or words made any claim of right in himself until about four years ago, since which time both the plaintiff and the defendant have claimed to own them, each endeavoring to

assert his or her rights therein, which have been constantly disputed and resisted by the other.

It is said by the plaintiff that no notice of any kind of defendant's claim was given to him, and that the defendant does not claim that she ever said anything to him, or made any claim to the premises in question; also that the acts of the defendant with reference to the disputed premises are consistent with the claim of the plaintiff that the defendant's use of the same was by permission of the plaintiff, and not hostile, adverse, and exclusive.

It was not necessary for the defendant to show that she gave the plaintiff notice of her claim in words. It was sufficient if her occupancy and use were exclusive, open and notorious, [214] and of such a character as would indicate to the plaintiff that she was exercising it as a matter of right. The evidence tended so to show, and it was for the jury to determine: Willey v. Hunter, 57 Vt. 479; Plimpton v. Converse, 44 Vt. 158; Eddy v. St. Mars, 53 Vt. 462, 38 Am. Rep. 695.

The only question, then, being whether the verdict was against the weight of evidence, the motion was addressed to the discretion of the trial court, and its action thereon is conclusive: Sowles v. Carr, 69 Vt. 414, 38 Atl. 77.

Judgment affirmed.

To Constitute the Possession of land adverse, we do not understand it necessary that the true owner shall have actual knowledge of the adverse claim; but unless he has such knowledge, the possession must be so open and notorious as to raise the presumption of notice: Carney v. Hennessey, 74 Conn. 107, 92 Am. St. Rep. 199, 49 Atl. 910; King v. Carmichael, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454; monographic note to De Freize v. Quint, 28 Am. St. Rep. 158-162. That adverse possession must be hostile and under a claim of right, see Ashford v. Ashford, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82, and cases cited in the cross-reference note thereto.

AVERY v. VERMONT ELECTRIC COMPANY.

[75 Vt. 235, 54 Atl. 179.]

EMINENT DOMAIN—Public Use, What is not.—The application of water-power to the generation of electricity for use as the motive power of a railway is not a public use for which the legislature may authorize the exercise of the power of eminent domain. (p. 820.)

WATERCOURSE—Right to Compel Land Owner to Submit to Flowage.—One riparian owner has no right to compel another to submit to the flooding of his land by the raising of dams on the lands of the former. A statute purporting to create or to give such a right cannot be supported on the ground that it is not the exercise of the right of eminent domain, but a statutory regulation of rights common to riparian owners. (p. 822.)

Edmund C. Mower, for the petitioner.

W. L. Burnap and A. G. Whittemore, for the defendant.

[237] MUNSON, J. The petition alleges that the petitioner is the owner in trust of a certain mill property on the Winooski river, and that he desires to raise to the height of fifty feet a dam now existing on said property, and proposes to use the [238] water-power so provided in generating electricity for the operation of the Burlington and Hinesburgh railroad; shows further that the raising of this dam will flow the lands of other owners, and that the petitioner is unable to agree with them as to the damages they will sustain; and prays that he may be permitted to raise said dam, and for the appointment of commissioners to ascertain the damages caused thereby. It was moved that the petition be dismissed because it did not appear from the allegations that the flowage would be a public benefit, or such a public benefit as would warrant the taking under the constitution. The county court sustained the motion. No objection is taken as to the manner in which the question is raised.

It is provided in chapter 159 of the Vermont Statutes that one who desires to set up or continue a mill or manufactory on his land, and to erect or continue or raise a dam to obtain water therefor, and thereby flow the lands of another person, may secure the right to do so in the manner there provided, if commissioners appointed for that purpose, or the court itself, shall find "that the flowing of the land as proposed will be of public benefit." For the purposes of this discussion, it will be assumed, without consideration, that a plant for the generation of electricity, is a manufactory within the meaning of the statute.

The first question for consideration, as stated by the petitioner, is whether the application of water-power to the generation of electricity for use in the operation of a railroad is such a public benefit as will justify an exercise of the right of eminent domain under the provisions of this chapter. But this statement of the inquiry is hardly broad enough for our

purpose; for this assumes that the statute names a constitutional ground of condemnation, and proposes to test the petitioner's [239] right by inquiring whether his case is within its terms. A more accurate statement of the question would be, whether this is a public use within the meaning of the constitution; for no finding of public benefit under the statute can avail, unless the statute and the constitutional provision are brought together by construction.

The argument of the petitioner is an earnest plea for a liberal construction of the term "public use." It is evidently considered that the term "public benefit" is a better expression of what is meant, and cases are cited where it is said that "public use" is synonymous with that term. We are also referred to the utterance of this court in Re Barre Water Co., 62 Vt. 27, 20 Atl. 109, where it is said that the power of condemnation "must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization." It is urged that the use of electricity has become so important to the prosperity and development of the state that the utilization of our water-powers for its production ought to be regarded as a public necessity.

We have in the petitioner's brief an extended presentation of the views expressed by other courts in dealing with the question of public use. In considering these opinions, it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision. It is true, nevertheless, that some of the cases cited proceed upon grounds that afford support to the petitioner's contention. In fact, the reasoning of some of them comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put [240] it to the best use, and that the refusal of an obstinate or grasping owner to part with his property ought not to be allowed to block the wheels of progress. It is needless to say that arguments of this character can have no weight in the determination of cases arising under the constitution of this state.

Our only decision upon the flowage law is found in Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398. It was there held that the owner of a grist-mill who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private. It

is said by the petitioner that that case is opposed to the decisions of most of the states which have passed upon the question, and this is true. But we find nothing in the arguments of other courts that leads us to question its soundness, and have no disposition to recede from it. A review of the adverse line of decision will be found in Lewis on Eminent Domain, sections 178-181. This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use within the meaning of the constitution, and says that the circumstances under which the contrary decisions were made may explain, but do not justify, them.

But it is said that the purpose of this condemnation is to provide motive power for a railroad, and that the railroad is unquestionably a public servant. Treating the case as if the application were by the railroad company itself, the reasoning of this court in Eldridge v. Smith, 34 Vt. 484, is decidedly against the right. The distinction between taking the land necessary for the road, and the taking of property for use in the production of the means to be employed in carrying it on, is there clearly pointed out. But it is not necessary to resort to an application of this doctrine, for the reason of the decision [241] in Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398, is controlling here. If the petitioner's purpose were found to be as alleged, this would not meet the requirement. It is true that the railroad must serve the public, but there is nothing that binds the petitioner to serve the railroad. And if we look to some direct service of the general public, there is nothing that binds the petitioner to give equal advantages to all. The suggestion that a failure in this respect would work a forfeiture does not remove the difficulty. The conditions which make the use public must exist at the time of the taking.

We have thus far considered the statute upon the theory that it was designed to give the right of eminent domain to every riparian owner for the maintenance of a mill or manufactory of public benefit. This was the view formerly taken of the mill act of Massachusetts; but the more recent doctrine of that state is that the provision is not an exercise of the right of eminent domain, but a statutory regulation of rights common to the riparian owners. It is insisted that the petition can be sustained on this ground.

The doctrine referred to is claimed to be analogous to that upon which provision is made for the partition of land held

by several tenants in common. The different owners of the bed and banks of the stream are treated as having a common interest in the reasonable use of the flowing water. It is said that one reasonable use of the water is the use of the power inherent in the fall of the stream, that this power cannot be used without damming the water and causing it to flow back, and that one man may own the fall, and another the land which it is necessary to flow. The courts of Massachusetts hold that the legislature may secure the full value of the stream to the different owners by combining these two interests [242] for use, and compelling the owner of the flooded land to take his share in money. This doctrine is apparently approved by Judge Redfield in his note to Allen v. Inhabitants of Jay (in the American Law Register for August, 1873), 12 Am. Law Reg., N. S., 481, and sanctioned by the supreme court of the United States in Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441.

We cannot adopt this view. It seems to assume that the land goes with the stream, instead of the stream with the land, and to give the riparian owners a joint interest in the land because of their peculiar rights to the water. But the owners of the various properties are the several and independent owners of their respective parcels of land, and their only right to the water is such as this ownership gives them. To say that one's holding of the land is subservient to such use as the lower owner may desire to make of the water is to reverse all our theories regarding the use of streams. It is true that in Johns v. Stevens, 3 Vt. 308, Judge Prentiss seems to assume that it would be within the power of the legislature to encourage the building of mills by a statute of this character. But in Adams v. Barney, 25 Vt. 225, where the right of the owner of one side of the stream to maintain a dam across it was involved, Judge Redfield said that the land on the opposite side was the defendant's, and that the plaintiff had no right to use it, and that no court or legislature had the power to give him the right. This certainly excluded the idea of an acquirement of mill privileges through a statutory regulation of riparian rights.

It should be noticed, also, that the argument advanced in support of the statute as thus classified is not coextensive with the right given. The argument is based upon the existence of a common interest in the stream, while the statute applies to all flowable lands. A dam of moderate [243] elevation may flood

the land of one whose premises are not contiguous to the stream, and who consequently has no interest in it. The maintenance of the petition upon the ground last urged would amount to a holding that all private lands in the state that can be flowed by the highest practicable dams are held subject to the full utilization of the streams upon which they lie. The Massachusetts court supports its position by holding that the mere flowing of land is not a taking of the property, a conclusion which we are not ready to adopt. We think Mr. Lewis is right in saying that appropriations of this character cannot be sustained without virtually expunging the words "public use" from the constitution.

Judgment affirmed.

The Condemnation of Property for mills and manufactories, including the flowage of land, is discussed in the monographic note to Beekman v. Saratoga R. R. Co., 22 Am. Dec. 699-703. An examination of this note will show that there is some diversity of judicial opinion upon the question whether such condemnation is a legitimate exercise of the right of eminent domain. The supreme court of Illinois has recently decided that a statute which authorizes the condemnation of private property for the purpose of public mills and machinery, other than public grist-mills, is unconstitutional, as permitting the taking of private property for private use: Gaylord v. Sanitary District, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522.

PORTER v. SHATTUCK.

[75 Vt. 270, 54 Atl. 958.]

LIMITATIONS, STATUTE OF.—An Action for the Recovery of Interest on a promissory note secured by a mortgage on realty is barred when the right of action on the principal is, though the mortgagee retains the right to recover possession of the mortgaged premises in ejectment or by foreclosure proceedings. (p. 824.)

Assumpsit. Judgment for the defendant; the plaintiff appealed.

Edward H. Deavitt, for the plaintiff.

William E. Johnson, for the defendant.

271 START, J. The question is whether the statute of limitations bars an action for the recovery of interest that accrues on a promissory note secured by mortgage on realty and payable on demand, with interest annually, after the right of action for the recovery of the principal is barred by the statute. The claimant contends that inasmuch as the mortgagee could re-

cover the possession of the mortgaged premises in an action of ejectment or foreclosure proceedings, at any time within fifteen years after the mortgage debt became due, unless the mortgagor paid the mortgage debt within the time fixed by the court, and inasmuch as the mortgagor, in order to redeem the premises, must pay the mortgage note, with interest, according to the terms, the right of action for the recovery of interest that accrues is not barred by the statute of imitations so long as the right of action for the recovery of the possession of the mortgaged premises continues, and that the mortgagor is estopped from availing himself of the statute.

[272] The mortgagee's right to maintain an action at law, or in equity, for the recovery of the possession of the mortgaged premises is in no way dependent upon whether the mortgagor's personal liability for the payment of the mortgage debt is barred by the statute, but upon his continued ownership of the premises, subject to the mortgagor's equity of redemption; nor is the mortgagor's right to redeem the premises dependent upon whether he is personally liable for the mortgage debt. The right attaches to, and may be exercised by, the owner of the equity of redemption, irrespective of whether he is, or ever has been, personally holden for the payment of the mortgage debt. Therefore, the right to maintain a real action for the possession of the premises is not determinative of the right to maintain a personal action against the mortgagor for the recovery of the mortgage debt. In Houghton v. Tolman, 74 Vt. 467, 52 Atl. 1032, it is held that a note secured by mortgage upon realty is within the statute of limiting actions of assumpsit founded on contract, express or implied, to six years after the cause of action accrues. In that case it is said that a mortgage has two distinct remedies—one upon the note, barred in six or fourteen years, according to whether the note is witnessed or not, and one upon the mortgage, barred in fifteen years, in analogy to the statute barring the right of entry into houses and lands in that time—and that the loss, for any reason, of either of these remedies, does not affect the other, if the debt remains unpaid.

Interest accruing upon a promissory note is regarded as an incident of the principal of the note, and when this is barred by the statute, no recovery can be had for interest that thereafter accrues. In Grafton Bank v. Doe, 19 Vt. 463, 47 Am. Dec. 697, the court, in holding that interest that becomes due yearly upon a promissory note is not barred so long as the

right of [278] action for the principal continues, said: "The statute does not begin to run upon the demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portions. The accruing interest from year to year is not thus separated from the principal demand; and consequently the statute of limitations does not run upon it until the principal is barred by the statute."

Judgment affirmed.

The Bar of the Debt by the statute of limitations as barring the remedy on the mortgage by foreclosure or ejectment, is considered in the monographic note to Menzel v. Hinton, 95 Am. St. Rep. 664-669.

STATE v. SHEDROI.

[75 Vt. 277, 54 Atl. 1081.]

CONSTITUTIONAL LAW—Classification Exempting Union Veterans.—A statute requiring all peddlers to be licensed and exacting license taxes from all but residents of the state who have served in the war for the suppression of rebellion and have been honorably discharged, discriminates in favor of them in a manner which amounts to a denial to other persons of the equal protection of the laws, and thereby violates the fourteenth amendmnt to the constitution of the United States, and is unconstitutional and void. (p. 830.)

Information for peddling without a license. A demurrer to the information was overruled, and the defendant excepted.

G. C. Frye, for the respondent.

M. G. Morse, state's attorney, for the state.

[278] WATSON, J. The respondent is informed against for becoming a peddler without a license in force, under the provisions of Vermont Statutes, chapter 198, as amended by No. 94, Acts of 1900, and the case is here upon demurrer to the information. It is contended that the law upon which this information is based is in conflict with the fourteenth amendment to the constitution of the United States.

[279] That the license fee required to be paid under the provisions of this chapter for the privilege of selling goods as a peddler is a tax upon the goods themselves, was determined by this court in State v. Hoyt, 71 Vt. 59, 42 Atl. 973. In that case, the law was held to discriminate unjustly against goods manufactured in this state, and for that reason unconstitu-

tional. Later the law was so amended as to avoid such discrimination: Acts of 1900, No. 94.

Vermont Statutes, 4732, provides that a person who becomes a peddler without a license in force, as provided in that chapter (198), shall be fined not more than three hundred dollars, and not less than fifty dollars.

By Vermont Statutes, 4733, persons resident of this state who served as soldiers in the war for the suppression of the Rebellion in the southern states, and were honorably discharged, are exempt from the payment of a license tax under the provisions of that chapter. It is urged that herein the law unjustly discriminates in favor of such soldiers, and against other persons, by reason of which it is in violation of the fourteenth amendment, whereby no state can "deny to any person within its jurisdiction the equal protection of the laws."

Can such an exemption be made by the legislature without affecting the validity of the general provisions of that chapter, is the question.

In Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. Rep. 533, speaking through Mr. Justice Bradley, the court said: "The provision of the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of [280] charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impossible and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think we are

safe in saying that the fourteenth amendment was not intended to compel a state to adopt any iron rule of equal taxation." And in Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, the court speaking through Mr. Justice Field, said this amendment "in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of [281] wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." And in Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594, it is said that the rule only prescribes that the "law have the attribute of equality of operation; and equality of operation does not mean indiscriminate operation on persons merely, as such, but on persons according to their relation." Such is the rule laid down by this court in State v. Hoyt, 71 Vt. 59, 42 Atl. 973, above cited. It was there held that the mere fact of classification is not enough to exempt the operation of the statute from the equality clause of the constitution, but that it must also appear that the classification made is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary election.

By the law in question, the legislature has made a classification by placing persons resident of the state, who served as soldiers in the Civil War, and were honorably discharged, in one class, and all other citizens together in another class. All persons engaged in the business of peddling, whether they belong to the one class or the other, must have a license in force or be subject to a penalty; but a license tax is required to be

paid by persons in the latter class, while a license may be had by all in the former class, without the payment of such tax. The classification, therefore, is one of taxation. From one class a tax on their goods authorized so to be sold is exacted for the privilege of doing business as a peddler, while the other [282] class may carry on the same business in the same manner, sell the same kind and quality of goods in the same territory, without payment of such tax.

Does this classification have the equality of indiscriminate operation on all persons licensed thus to do business according to their relations? Upon the answer to this question's being in the affirmative or in the negative depends the validity or the invalidity of the law in question under the equality clause of the fourteenth amendment.

Upon what basis does the attempted classification rest? There is no basis upon which it can rest except that persons in the one class served as soldiers in the Civil War and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since past, and not on a present situation or condition, nor on a substantial distinction having reference to the subject matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army they returned to no particular class—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens and responsibilities as other citizens similarly circumstanced in law, in the same jurisdiction.

Assuming that thus to have served as a soldier and to have received an honorable discharge may well merit reasonable considerations at the hands of the state in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole; for equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances [283] and conditions, both in the privileges conferred and liabilities imposed": Magoun v. Illinois Trust etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594.

It cannot be said that service as a soldier in the Civil War and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration.

There is no difference between the present conditions and circumstances of such veterans and those of other citizens regarding the relations to the law or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection and based upon no reasonable grounds.

In State v. Hoyt, 71 U. S. 59, 42 Atl. 973, referring to the equality clause, it is said that it is enough if there is no discrimination in favor of one against another of the same class; but that, when such discrimination exists, it impairs that equal right which all can claim in the enforcement of the laws. And the cases of State v. Harrington, 68 Vt. 623, 35 Atl. 515, and State v. Cadigan, 73 Vt. 245, 87 Am. St. Rep. 714, 50 Atl. 1079, are much in point. In the former, the respondent was charged with selling and exposing for sale goods, wares, and merchandise as an "itinerant vender," without a license therefor. It was contended upon demurrer to the information that the law upon which the prosecution was based discriminated between itinerant venders and resident venders, and between classes of itinerant venders, and therefore it was in conflict with both the state and federal constitutions. It was held that the state might require a license fee from persons in one occupation, and not from those in another, provided no discrimination was made between those of the same class. In the latter case, the respondent was charged with acting as agent of a partnership organized under the laws of the state of New York in selling certain municipal bonds here without the [284] partnership having procured a license from the inspector of finance, etc., as required by the laws of this state. It was held that to discriminate between residents of our own state by denying to one class the privilege of transacting business without complying with conditions and exactions not required of others, when the ground of classification is wholly fanciful and arbitrary, is a denial of the equal protection of the laws.

The constitutional right of a state legislature to discriminate in favor of persons who served in the army or navy of the United States in the Civil War has been before the court of last resort in several of the sister states. In New York, the constitution provides that appointments and promotions in the civil service "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations which, so far as practicable, shall be competitive." In the Matter of Keymer, 148 N. Y. 219, 42 N. E. 667, it was held that a provision of the

civil service law in effect that as to honorably discharged soldiers and sailors of the Civil War competitive examinations should not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed four dollars per day was in conflict with the constitution. And a somewhat similar law in Massachusetts, purporting absolutely to give veterans particular and exclusive privileges different from those of the community in obtaining public office, was held to be not within the constitutional power of the legislature: Brown v. Russell, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005.

In Iowa, the constitution provides that "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall equally belong to all citizens." A statute requiring peddlers to procure [285] a license and to pay a license tax contained the provision that the section requiring the payment of the tax should not be held to apply "to persons who have served in the Union army or navy." In State v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959, it was contended that because of this immunity from the tax to peddlers who so served in the army or navy, the law was void. In an extended opinion reviewing many authorities, the court, saying that the attempted classification is based on no apparent necessity or difference in condition or circumstances that have any relation to the employment in which the veteran of the Civil War is authorized to engage without paying license, and that it savors more of philanthropy than of reasonable discrimination based upon real or apparent fitness for the work to be done, held the law unconstitutional.

We think it clear that the driscrimination made in the law in question, in favor of persons who served in the war of the Rebellion and were honorably discharged, is without reasonable ground and arbitrary, having no possible connection with the duties of the citizens as taxpayers, and their exemption from the payment of the tax therein required of others exercising the same calling is pure favoritism, and a denial of the equal protection of the laws. It follows that section 4732 of the Vermont Statutes is unconstitutional and without force, and that section 4733 of the Vermont Statutes, so far as it relates to the payment of licenses required by said chapter 198, is unconstitutional and without force.

Pro forma judgment reversed, demurrer sustained, information adjudged insufficient and quashed, the respondent discharged and let go without day.

A Statute Requiring a License fee to be paid by all persons who peddle in the country, except veterans of the Civil War, is pronounced unconstitutional in State v. Garbroski, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959. See, too, Brown v. Russell, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005.

McDOWELL v. McDOWELL.

[75 Vt. 401, 56 Atl. 98.]

LIMITATIONS, STATUTE OF.—An Indorsement by a Payee of payment made on a promissory note after it is barred by the statute of limitations is evidence against the maker of the fact of payment. (p. 832.)

PRACTICE—Harmless Error.—The admission of evidence of credits appearing on the account, if erroneous, does not prejudice the defendant, and he cannot be harmed by the fact that they were before the jury. (p. 832.)

PAYMENT, Evidence of, What not Admissible to Prove.—The defendant is not entitled, on the issue of payment, to prove that he had moneys on deposit to the knowledge of his creditor. (p. 832.)

LIMITATIONS, STATUTE OF.—A Payment Need not Have Been Made with Intent that It Should be Applied to the Payment of the Debt to remove the bar of the statute. It is sufficient if made to the creditor by way of payment without directing its application, for, in that event, he was at liberty to apply it on any claim which was due, whether barred by the statute or not. (p. 833.)

LIMITATIONS, STATUTE OF.—An Indorsement of a Credit on a Note or Other Cause of Action is sufficiently supported where it is relied upon to take the case out of the bar of the statute, by evidence showing that it was for timber cut by the creditor on the land of the debtor under circumstances from which the jury may properly infer that the transaction was one of bargain and sale and not of trespass. (p. 833.)

PARENT AND CHILD—Presumption as to Services Being Voluntary.—The presumption that a party rendering services to another expects payment is never rebutted by the mere fact that the parties to the transaction are parent and child. (p. 833.)

Assumpsit. Pleas, the general issue, the statute of limitations. Verdict and judgment for the claimant. The defendant excepted.

May & Simonds and B. E. Bullard, for the defendant.

Dunnett & Slack, for the plaintiff.

403 MUNSON, J. This was an appeal from the decision of commissioners appointed by the probate court for the adjust-

ment of claims. The claim presented consisted of a promissory note bearing several indorsements in the handwriting of the payee, and certain charges upon book against which various sums had been credited. The pleas included payment and the statute of limitations.

The defendant excepted to the admission of the last two indorsements, and to the failure to charge that both payments must be established to permit a recovery on the note. The court received and submitted these indorsements as evidence tending to show payment, but not as evidence sufficient in itself [404] to establish payment, and charged that the plaintiff could recover upon a finding of the payment evidenced by the last indorsement. But if the payment indicated by the preceding indorsement was not found, the note was barred by the statute when the last indorsement was made, and the defendant contends that an indorsement made by the payee upon a note already barred is not evidence. It is said that an indorsement so made is a declaration in the payee's own interest, and that Vermont Statutes, 1216, ought not to be held to authorize the use of a self-serving declaration. But this provision was passed upon in Bailey v. Danforth, 53 Vt. 504, and it was then considered, upon a full recognition of the distinction regarding the payee's interest, that an indorsement not written by the payor is evidence, whether made before or after the statute has run. We see no occasion to depart from this holding.

The plaintiff was a witness so far as to prove in whose handwriting his charges were: Vt. Stats. 1239. He procured his account with the deceased, and testified without objection that it was in his handwriting, and that both debit and credit items were made at the time of the transactions to which they related. The account was then received in evidence against the defendant's exception, and it is now insisted that the items of credit should have been excluded. It is not necessary to inquire how the matter is affected by the section referred to. The credits were not needed to save the charges from the statute of limitations and the defendant cannot have been harmed by the fact that they were before the jury.

It was not error to exclude defendant's offer to show that the deceased had money on deposit to the plaintiff's knowledge. The evidence held to have been properly received in Strong v. Slicer, 35 Vt. 40, was evidence given by the defendant of the pecuniary condition of both the plaintiff and himself. If this [405] offer had included the further element that the plain-

tiff was in pressing need, the case referred to would have been in point. But the mere fact that the debtor has money which the creditor knows of is not evidence tending to prove payment.

The defendant was not entitled to a charge that the payments must have been made with an intent to have them applied on the note. If the money or other property was delivered by way of payment, without directing its application, the creditor could apply it upon any claim that was due, whether barred by the statute or not: 2 Am. & Eng. Ency. of Law, 2d ed., 438; and see Early v. Flannery, 47 Vt. 253; Hicks v. Blanchard, 60 Vt. 673, 15 Atl. 401; Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716.

The evidence tended to show that the first of the disputed indorsements was for the value of some cedar cut by the plaintiff on land of the deceased. The defendant insists that there was no evidence, other than the indorsement, tending to show that the cedar was a proper subject of charge, and that it was error to leave this indorsement to the consideration of the jury. The deceased and the plaintiff were father and son, but were living in different places, with distinct properties and business interests. The case says the evidence tended to show that this was cedar "which the plaintiff had of his father in 1896." This language points to an understanding between them rather than to a trespass, and their independent relations suggest a business understanding rather than a gift. So there were circumstances in the case from which the jury might properly be permitted to infer that the transaction was one of bargain and sale.

The defendant requested an instruction that the plaintiff could not charge the deceased for services rendered by his minor son under a contract made with the son, without showing that the deceased had promised to pay him. The request [406] seems to have been based, notwithstanding some inconsistent language, upon a claim that the relationship between plaintiff and deceased was sufficient to rebut the ordinary inference of an expectation of payment. But this inference is never rebutted by the mere fact that the parties to the transaction are parent and child. There is nothing in the case that indicates the existence of any special condition that bore upon the dealings of the plaintiff and his father. In fact, the original arrangement regarding the plaintiff's son shows that there was none. The deceased first hired the plaintiff's son for a month by express contract with the plaintiff at a stated compensation,

and the disputed charge is for a second month during which the son continued to work under an arrangement between his grandfather and himself. The question presented is simply that of a father's right to recover for the services of his minor son.

Judgment affirmed.

The Application of Payments by a creditor to claims barred by the statute of limitations is considered in the monographic note to McWhorter v. Bluthenthal, 96 Am. St. Rep. 67, 68; and indorsements on a note as evidence of payment or of the application of a payment are considered at page 79 of this note.

CITY OF MONTPELIER v. CAPITAL SAVINGS BANK.

[75 Vt. 433, 56 Atl. 89.]

INTERPLEADER.—The Complainant, to Maintain a Plea of Interpleader, Must have no Interest in Conflict with that of Either Defendant, but must merely hold a fund or owe a debt or duty which he is willing to pay or discharge in favor of a rival claimant, whichever he may be. (p. 835.)

INTERPLEADER.—One cannot Compel Others to Interplead where their relative rights depend on a question of fact to be settled between himself and one of the parties, though he will not be pecuniarily affected by the decision of the question. (pp. 836, 837.)

INTERPLEADER.—One cannot Compel an Interpleader where he is beset with a claim founded upon his own alleged promise merely because others who are third parties, instead of himself, must ultimately be the losers if the claim is established. (p. 837.)

INTERPLEADER.—One cannot Compel an Interpleader where there is a controversy touching the amount of the fund which should be brought into court, as where the fund consists of an unliquidated sum, the amount of which can be determined only by hearsay testimony. (p. 837.)

Bill of interpleader. A demurrer was sustained and the bill dismissed. The complainant appealed.

Frederick P. Carleton, for the orator.

T. J. Deavitt and Edward H. Deavitt, for the defendants.

434 STAFFORD, J. The city of Montpelier brings its bill of interpleader, and is met by demurrer. What the bill alleges is this: The city contracted with a firm in Massachusetts to build the city a schoolhouse for the price named. Before the house was completed, the firm went into bankruptcy, and

neither the firm nor its trustee in bankruptcy did anything more under the contract; so the city went on and completed it as cheaply as it could, and, deducting from the contract price what it had already paid the firm and what it has since been obliged to pay to complete the work, it offers to bring into court the balance, naming it. Before the firm abandoned the contract, it had drawn orders on the city in favor of several creditors who had furnished material, etc., toward the structure, and each of these orders the city had accepted conditionally upon its owing the firm the amount thereof after the payment of all previous orders. The holders of these orders are claiming payment, but the trustee is insisting that they were given in fraud of the bankruptcy act, wherefore the city should not pay them, but should pay the whole balance to him. The trustee and the order holders are asked to interplead. With them is joined another defendant, the Norwalk Lock Company, which claims to have furnished material upon the order and responsibility of the city, and has sued it at law therefor. This party holds no order, and does not look to the fund itself, but to its own contract with the city. The city does not say whether it is directly responsible to this party or not, but says that, if it is, it will add so much to the cost of completing the building, and deduct it from the balance before named, in which case the amount will be insufficient to pay the orders in full. The trustee claims that these materials of the lock company were bought by the firm itself before the latter filed its petition in bankruptcy.

It is well settled that to maintain a bill of interpleader, the complainant must have no interest in conflict with that of either defendant, but merely hold a fund or owe a debt or duty which he is ready to pay or discharge in favor of the rightful claimant, whichever he may be: Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615.

It is objected, in the first place, that the complainant is not a disinterested party, in this: that by reason of accepting the various orders it is "a necessary party to determine the effect of such acceptances." But upon the facts admitted by the demurrer there is no question as to the effect of the acceptances between the complainant and the order holders. Excluding from consideration the lock company's claim, of which we shall speak hereafter, the fund is sufficient to pay all the orders, and the only question is whether the complainant shall pay the amount thereof to the respective holders, or pay the fund to

the trustee in bankruptcy; and that is the question which the complainant asks to have the holders and the trustee settle between themselves. Hence we think this objection is invalid.

[436] But, in the second place, it is objected that the lock company's claim against the complainant being upon a liability independent of the fund, the complainant is not entitled to maintain the bill because it is not entitled, upon payment of the fund into court, to be released from all further responsibility. The rule is thus expressed in the Encyclopedia of Pleading and Practice, volume 11, page 59: "Interpleader will not lie if the plaintiff has incurred some personal obligation to either of the defendants, independent of the title or right to possession, because such defendant would in that event have a claim against him which could not be settled in a litigation with the other defendants"—a proposition abundantly supported by authorities. The reason urged by the demurrants, however, will not bear inspection. They say that, if an interpleader were ordered, and it should be determined that the complainant is under direct liability to the lock company, the latter would have no means of collecting a portion, at least, of its debt, since by depositing the fund in court the complainant cancels all its obligations, leaving each claimant to get what he can from the fund, whereas the fund is not sufficient for the payment of all. But such is not the situation, for the lock company, if it got any of its claim, would get all, and the order holders would be the losers, since they are entitled to be paid only from the balance remaining when the contract is performed. The fund which the complainant would bring into court to be contended for between the order holders and the trustee is uncertain in amount by reason of the uncertainty that exists in regard to the lock company's right to be paid; and this uncertainty consists in the doubt as to whether the complainant became liable to the lock company. The real question, then, is whether one can compel others to interplead when their relative rights depend upon a question of fact to be settled between [437] himself and one of the parties, even though he will not be affected pecuniarily by the decision of that question. Here the complainant will not be affected pecuniarily, because it is bound to pay only the ultimate balance; but whether that balance shall go all to the trustee or all to the order holders, or part to the order holders and part to the lock company, is the question. The latter branch of it—whether a part is to go to the lock company rather than to the order holders—is a question which

the complainant must determine for itself, for it must be supposed to know whether it engaged to pay the lock company, and cannot cast upon others the burden of settling that question.

It will be observed that the order holders and the trustee both claim through the building firm, while the lock company does not. In other words, there is no privity between the latter and the other defendants. There is strong, if not uniform, authority for holding that some sort of privity is indispensable: See the cases cited in 11 Ency. of Pl. & Pr. 449. But, whether that be unqualifiedly true or not, we hold that a bill of interpleader will not lie where the complainant is beset with a claim founded upon his own alleged promise, merely because there is a third party, who, instead of the complainant, must ultimately be the pecuniary loser if the claim is established, for the former has a right to litigate the question with the party who became bound to him, and need not concern himself with the question of right between the complainant and such third party: Holmes v. Clark, 46 Vt. 22; French v. Robrchard, 50 Vt. 43; North Pacific Lumber Co. v. Lang, 28 Or. 246, 52 Am. St. Rep. 780, at 787, 788, 42 Pac. 799.

There is a third objection which, perhaps, should be considered in view of the situation of the parties and the course to be taken hereafter in this case. It is said that the complainant [438] is not a disinterested party, in this: that it is interested to prove that the building could not have been completed for less than it expended in completing it; in other words, that it is a necessary party to any controversy touching the amount of the fund that should be brought into court. We think this objection also is valid, and that it is well taken by demurrer, without an answer putting the amount of the fund in controversy; for it appears from the bill itself that the fund consists of an unliquidated sum, depending upon the determination of the question how much the contracting firm had earned by its partial performance of the contract. To any litigation touching that question the city is a necessary party.

Decree affirmed and cause remanded.

The Right of Interpleader is considered at length in the monographic notes to Connecticut etc. Ins. Co. v. Tucker, 91 Am. St. Rep. 593-614; Shaw v. Coster, 35 Am. Dec. 695-712.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

COWLES v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

[32 Wash. 120, 72 Pac. 1032.]

SURETYSHIP.—Contracts of Suretyship or Guaranty Entered Into for a Compensation are Governed by the rules applicable to insurance contracts. (p. 840.)

GUARANTY SURETYSHIP—Work, When Deemed Done Under the Original Contract.—If a contract for the construction of a building is entered into, accompanied by the bond of a guaranty suretyship company, alterations with the consent of the contractor, though not made upon the written order of the architect as provided for in the contract, do not result in a new contract to which the contract of suretyship is inapplicable. (p. 842.)

GUARANTY SURETYSHIP—Changes in Contract Which do not Relieve Surety.—If a contract for the construction of a building is entered into, accompanied by the bond of a guaranty insurance company for its faithful performance, and the contract provides that alterations shall not be made except upon the written order of the architect, the fact that alterations are made without such written order will not release the surety, if the contractor consents, and the architect audits and certifies the amount which should be paid for such alterations. (p. 843.)

Stephens & Bunn, for the appellant.

Danson & Huneke, for the respondent.

122 DUNBAR, J. The defendant Creutzer entered into a contract in writing with appellant, whereby Creutzer agreed to construct a dwelling for appellant. The contract provided that Creutzer should give a surety bond in the sum of three thousand dollars to secure the performance of all the terms of

the contract. Respondent became surety on the bond so required. Creutzer failed to comply with the contract. Appellant completed the work and brought this action to recover three thousand dollars, which amount he alleges he paid, to complete the dwelling in excess of the contract price. At the close of the evidence on the part of appellant (plaintiff below), the respondent surety company challenged the sufficiency of the evidence, and moved the court to discharge the jury from further consideration of the case, and direct what judgment should be entered, upon the following grounds: 1. That the evidence for the plaintiff shows that there are numerous alterations made in the contract and in the work, other than upon the written order of the architect; 2. That the value of these changes and alterations is not computed by the architects, as required by the contract, and the value thereof either added to or deducted from the contract price; 3. That the evidence shows that plaintiff and the contractor, Creutzer, entered into a distinct and separate agreement as to his compensation for all alterations other and distinct from the provisions of the contract; 4. That the evidence of the plaintiff shows that plaintiff released the contractor, Creutzer, from all liability on this bond; 5. That the evidence shows that, [123] contrary to the provisions of the bond, plaintiff and the contractor made an agreement whereby certain grading was included and work provided in the contract, and it was not provided for therein; 6. That the evidence of plaintiff shows that a payment, to wit, that of thirty-five dollars, on account of the bond in this case, was made by the plaintiff and certified by the architect as a proper charge under the contract. The court sustained the motion, on the ground that the changes were not ordered in writing, holding that as against the surety company the parties could not waive the provision of the contract which provided that all changes should be ordered by the architect in writing, and that the provision was manifestly made for the benefit of the surety company. Appellant excepted to the ruling of the court granting the motion and making the order in accordance therewith. The contract is too long to be set forth in detail, but it is the ordinary building contract in its general scope, and the bond is in form the ordinary surety bond given in such cases. The section of the contract which is the subject upon which the main controversy in this case arises is as follows: "No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects,

and, when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen, the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference."

This provision of the contract was waived by the contractor [124] and the owner and the architect. Subsequently, however, the architect audited and certified the amount which should be paid for changes, extras and alterations, and it is the contention of the appellant that such an act on the part of the contractor and principal in the bond was binding upon the respondent surety company, and a neglect or a default of any of the requirements of the written order of the architect cannot be taken advantage of by the respondent surety company; that the contractor was the general agent and representative of the surety, to act for it, and to waive, if he saw proper, on behalf of the surety company, anything within the purview of his agency.

There are no material contested questions of fact so far in this case, and its proper determination hinges upon the legal proposition announced above. It is contended by the appellant that a distinction exists between the liability of a noncompensated surety and that of a compensated surety; that the doctrine of strictissimi juris, which has been invoked successfully by accommodation bondsmen, should not apply to parties who furnish bonds for compensation. We have not been able to obtain any light from the cases cited from this court, any further than that they discountenance the old rule that there should be a difference in construction between bonds and other contracts, even in cases where the bonds were given purely as a matter of accommodation. We think, however, on general authority, that, while this class of suretyships is comparatively new, a distinction has been clearly announced by the courts, and that this character of suretyship is governed by the rules governing insurance contracts. Guaranty insurance is thus defined by Mr. Frost in his work on the Law of Guaranty Insurance, section 2, as follows: "For purposes of classification and

treatment herein, guaranty insurance contracts may be divided into three general classes—those of fidelity, [125] commercial, and judicial insurance." Commercial insurance is defined as having reference to indemnity agreements issued in the form of insurance bonds or policies, whereby parties to commercial contracts are to a designated extent guaranteed against loss by reason of a breach of contractual obligations on the part of the other contracting party. To this class belong policies of contract, credit, and title insurance. Then follows a definition of fidelity insurance and judicial insurance, distinguishing them from commercial insurance. In his criticism of courts which have insisted on following the old rule, the author pertinently remarks: "It is but natural that courts, so long accustomed to extending the 'rule of favoritism' toward the surety in the old-time private bonds, should be slow to recognize that with the passing away of the reason for the existence of the rule by the advent of the compensated surety, the rule itself should pass away. The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The policy is written by a company incorporated for the express purpose of furnishing guaranty bonds as a means of revenue to the corporation and its stockholders."

This class of insurance cannot be distinguished in principle from what is called guaranty insurance, where the guaranty company guarantees the honesty and efficiency of employés. Such a bond was construed by this court in Remington v. Fidelity etc. Co., 27 Wash. 429, 67 Pac. 989, as follows: "Bonds of this character are, in their nature, insurance contracts, to indemnify the employer against the dishonesty of employés. They are issued for profit, and the [126] same rules of construction must apply thereto as apply to other insurance contracts. If, looking at all its provisions, the contract is fairly and reasonably susceptible of two constructions, one favorable and the other unfavorable to the insurance company, the latter, if consistent with the object for which the contract was made, must be adopted, for the reason that the instrument which the court is required to interpret was prepared by the attorneys, officers, or agents of the insurance company": Citing many cases. As to the right of the parties to the original contract to vary the

terms of the contract, see 1 Joyce on Insurance, sec. 273. Also Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859, where a contract for the construction of a building provided that the contractors should be bound to perform a certain portion of the work, and that they might become bound to perform additional work and to complete the building on the owner's giving a written notice, prior to a certain date, of his election to have such contractors continue the work. The contractors executed a bond for the faithful fulfillment of the contract on which defendants were sureties. The owners served no written notice directing the contractors to continue work, but they did continue, and accepted a parol notice. It was held that the work subsequently done was done under the original contract, and that no new contract was entered into between the parties so as to release the sureties from liability for the contractors' failure to complete the building. The court quoted the following language from Benjamin v. Hillard, 23 How. 149: "It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's [127] consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain."

In this case we think it may be well said that no other contract was substituted for the original contract, and that the alterations in the contract were not so material as to make a new contract; but that there was simply an undertaking on the part of the parties to the original contract to mutually accommodate each other; so, applying the language just above quoted, as "better to arrive at their end," the thing provided for in this contract was done, and the divergence from the strict terms of the contract was merely a matter of detail. The agreement for the alterations was made by all the parties who were entitled under the contract to make it. The consent was given by the party who was authorized to give consent; not, it is true, in the form prescribed, viz., in writing, but that goes more to form than to substance, and, in the absence of a showing of some

damage, should not be allowed to avoid the contract, or the policy of insurance which became a part of it. The bond is subject to the contract, and was made after the contract. It is the contract instead of the bond which is primarily to be construed, and the construction of the contract cannot be affected by the fact that a bond is given for its performance. It must be construed with reference to the gathered intention of the parties to the contract, and whatever is binding upon them is binding upon the surety, who becomes a party to the contract, identified with the contractor.

In Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669, it was held that, where a building contract provided that [128] plaintiff was to make payments to the contractors upon certificates furnished by plaintiff's superintendent, the mere fact that such payments were made without such certificates was not such a departure as would relieve the contractor's sureties from liability, where they were no greater in amount than they would have been if such estimates had been exacted by plaintiff; which is a case, we think, exactly in point with the case at bar. That case went further than it is necessary to go to reverse the judgment in this case, and held that a surety on a contractor's bond was not released by reason of the fact that, after the contractors failed to complete the work and plaintiff gave the notice required by the contract in order to terminate it, he subsequently recalled the notice and allowed the contractor to proceed with the work, during which time the loss for which the surety was held liable occurred. It is true that there is a conflict of authority on this proposition, but we are inclined to follow the authorities cited, and hold that this guaranty company, being a company which is doing business for compensation, ought to be bound by the law governing fidelity guaranty companies and insurance contracts. It not appearing that any damage was done by the slight variance in the terms of the contract, or that any collusion or fraud was attempted on the part of the contractor and the owner, we conclude that the court erred in sustaining the motion challenging the sufficiency of the testimony. The same reasoning will apply to the other grounds of the motion.

The judgment will be reversed, and the lower court instructed to proceed with the trial of the cause.

Fullerton, C. J., and Mount, Hadley and Anders, JJ., concur.

THE DIFFERENCE BETWEEN GUARANTY OR SURETYSHIP ENTERED INTO FOR A VALUABLE CONSIDERATION, AND LIKE OBLIGATIONS ENTERED INTO GRATUITOUSLY.

It is too well settled to need the citation of authorities to establish the proposition that sureties are, ordinarily, regarded as favorites of the law, and not bound beyond the strictest terms of their contracts, this being upon the theory that they themselves are innocent parties, liable to suffer loss through no fault of their own.

A distinction is gradually being made by some of the courts, however, making the application of this rule depend upon whether or not the contract of suretyship or guaranty was entered into gratuitously or for a valuable consideration. If, for the former, the rule is held to apply; if for the latter, it is not. Some early decisions of the courts have recognized and acted upon this distinction: New Haven County Bank v. Mitchell, 15 Conn. 206; Mauran v. Bullus, 41 U. S. (16 Pet.) 528; and see Bank of Washington v. Barrington, 2 Penr. & W. (Pa.) 27. But, for the most part, the authorities are comparatively recent, growing out of fidelity and guaranty insurance, now so generally in use throughout the country.

Companies, dealing with the issuance of bonds of this character, cannot claim at one and the same time the full benefit of both the law of insurance and that of private suretyship. This is clearly set forth in Frost on Guaranty Insurance, section 4, where it is said: "Such a position would be, legally speaking, impossible as well as impracticable, in view of the widely diverging character of the contract of the private surety as contrasted with that of the insurer. It would be inequitable, as well as illogical, to permit the 'surety company' to assume at one time the attitude of a strict surety, and, as such, when sought to be held liable, to invoke to its aid every principle of law or equity applicable to that relationship; and then, at another, to assume the role of an insurer and call to its aid all the somewhat refined principles, as well as the technicalities of insurance law. The only proper solution of this problem seems to be that adopted by so many courts of high authority; namely, to treat the compensated surety in all cases as an insurer, subject in all respects to the general principles of insurance law, modified to a limited extent by the quasi suretyship nature of the contract, arising from the dual relationship sustained by the insurer to the insured and the 'risk.' . . . .

"As long as the primary, if not the only, purpose of the 'surety companies' in issuing their policies or bonds is to secure a pecuniary benefit for themselves, this fact alone should be sufficient in law to preclude them from asserting such rights of sureties or guarantors as are extended to the latter solely because of their position as favorites in the eye of the law," citing Pittsburg etc. R. R. Co. v. Keokuk etc. Bridge Co., 107 Fed. 781.

This certainly seems to be a reasonable view, for, as is pointed out in Commonwealth v. Equitable Ben. Assn., 137 Pa. St. 412, 18 Atl. 1112, the general purpose of an insurance company is not founded on any philanthropic or charitable principle, but is purely a business venture, the risk being assumed only for a fixed consideration.

Speaking of fidelity insurance, it is said in Mechanics' etc. Trust Co. v. Guarantee Co., 68 Fed. 459: "Although of more recent origin than the ordinary forms of insurance, such as fire, marine, and life, that this bond is a branch of insurance is clearly apparent. Cases involving this form of contract are extremely few, still, that the law of insurance applies by analogy is, undoubtedly, true, and this was fully recognized and clearly stated by the circuit court of appeals for this circuit, in Supreme Council Catholic Knights of America v. Fidelity etc. Co. of New York, 63 Fed. 48, 11 C. C. A. 96, in which Judge Lurton, delivering the opinion said: 'With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity, which the assured had reasonable grounds to expect. The rule applicable to fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case.'"

This same idea was expressed by Justice Harlan, when he said: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well established rule in the law of insurance: National Bank v. Insurance Co., 95 U. S. 673; Western Ins. Co. v. Cropper, 32 Pa. St. 351, 355, 75 Am. Dec. 561; Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597, 604; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. Rep. 1360; Fowkes v. Manchester etc. Life Assn., 3 Best & S. 917, 925. As said by Lord St. Leonards in Anderson v. Fitzgerald, 4 H. L. Cas. 484, 507, 'it [a life policy] is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construc-

tion favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank": American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. Rep. 552.

For other cases so construing bonds guaranteeing the fidelity of employers as insurance contracts and not as those of ordinary guaranty or suretyship, see Champion Ice etc. Co. v. American etc. Trust Co. (Ky.), 75 S. W. 197; Bank of Tarboro v. Fidelity etc. Co., 125 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; Walker v. Holtzclaw, 57 S. C. 459, 35 S. E. 754; Remington v. Fidelity etc., 27 Wash. 429, 67 Pac. 989; Cowles v. United States etc. Guaranty Co. (principal case), 32 Wash. 120, ante, p. 838, 72 Pac. 1032; Tebbetts v. Mercantile etc. Guarantee Co., 73 Fed. 95, 19 C. C. A. 281, 38 U. S. App. 431, the latter case applying the same rule to credit insurance, guaranteeing indemnity against business losses or uncollectible debts.

There have been several cases, however, in which surety companies, acting, of course, for a stipulated compensation, have gone upon the bonds of individuals or public officers, and the courts have stated with approval the rule of construction relating to ordinary sureties, and have not attempted to distinguish between where entered into gratuitously and where for a valuable consideration: American Surety Co. v. Thorn-Halliwell etc. Co., 9 Kan. App. 8, 57 Pac. 237; Howard County v. Hill, 88 Md. 111, 41 Atl. 61, citing Archer v. State, 74 Md. 443, 28 Am. St. Rep. 261, 22 Atl. 8; Harrisburg Sav. etc. Assn. v. United States Fidelity etc. Co., 197 Pa. St. 177, 46 Atl. 910; United States v. American Bonding etc. Co., 89 Fed. 925, 32 C. C. A. 420; United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526.

HORSFALL v. PACIFIC MUTUAL LIFE INSURANCE COMPANY.

[32 Wash. 132, 72 Pac. 1028.]

ACCIDENT INSURANCE.—Death by Accident is death by any unexpected event which happens as by chance or which does not take place according to the usual course of things. (p. 848.)

ACCIDENT INSURANCE—Death by Accident, What is.— Death due to dilation of the heart, caused by lifting a heavy weight in the usual course of one's employment, is death by accident. (pp. 848, 849.)

ACCIDENT INSURANCE—What Injuries Deemed to Leave Visible External Marks.—Where one, by lifting a heavy weight, causes a dilation of his heart, resulting in his subsequent death, the injury is one where there is a visible external mark, if at once he becomes deathly pale and sick, his hands and feet cold, and perspiration stands out on his face and hands, and the next day his color

changes from a ruddy to a bluish gray color, and so remains until his death. (p. 849.)

ACCIDENT INSURANCE.—Immediate Notice Required by a Policy Insuring Against Death by Accident Ordinarily Means within a reasonable time, and with due diligence under the circumstances of the particular case, of which the jury are ordinarily the judges. Notice within twelve days after death does not show such unreasonable delay as precludes submitting the question to the jury. (pp. 849, 850.)

F. R. Baker, for the appellant.

F. S. Blattner and Stiles & Doolittle, for the respondent.

133 MOUNT, J. Action to recover upon an accident insurance policy issued by appellant to John Horsfall during his lifetime. The respondent, Kate Horsfall, is the beneficiary under the policy in case of the death of the insured as the result of an accident covered by the policy. Plaintiff had judgment below, and defendant appeals.

The policy of insurance is in the usual form of accident insurance, and provides, among other things, for a weekly indemnity in case of injury from accident, and for a principal sum of twelve hundred dollars to be paid to the wife of the insured in case of the death of the insured within ninety days from the happening of such accident. It also provides that, unless the claimant gives to the company immediate written notice of any accident, with full particulars and affirmative proof of death, within ninety days from the time of the death, all such claims shall be forfeited. It provides further: "This insurance does not 134 cover . . . . injuries, or death resulting therefrom, of which injuries there are no visible external marks upon the body (the body itself not being considered such mark), produced at the time of and by the accident." The insured was a man fifty-eight years old at the time of his death, a blacksmith by occupation, weighed about one hundred and seventy-five or one hundred and eighty pounds, and was a strong, healthy, robust man, capable of a lift of from two hundred to two hundred and fifty pounds without difficulty. On March 24, 1902, while at work in the shop of the Puget Sound Iron Works at Tacoma, he was called upon to assist in carrying a bar of iron one and one-half by four inches thick and about twenty-two feet long, weighing from three hundred and fifty to four hundred pounds. This bar of iron was lying on a pile of round, flat, and square iron close to the wall of the building, so that Mr. Horsfall was compelled

to stand on top of the pile and reach below his feet in order to pick up the end of the bar. Another man had picked up one end of the bar, and Horsfall, by reason of his position, was at some disadvantage in picking up his end of the bar. He, however, picked up the end of the bar, and carried it to the anvil, where he laid it down, and immediately complained of being sick. He turned pale, trembled, grew cold, perspired profusely, and had to quit work. He went home and called a physician, who pronounced the trouble a violent dilation of the heart, causing hypertrophy, from which Mr. Horsfall died on April 18, 1902. Doctors, both for the plaintiff and for the defendant, testified that, under the circumstances of the lift, the lift itself, in their opinion, would cause the dilation of the heart. The appellant argues but one assignment of error, viz., "in denying appellant's motion for judgment of nonsuit and dismissal at the close of plaintiff's case." It is urged in support of this assignment: 1. That the evidence fails to [135] show that the deceased met with an accident of any kind; 2. If he did meet with an accident, it was not such an accident as was covered by the policy; and 3. There was no immediate notice given as required by the policy of insurance.

1. The policy insured the deceased against the effect of bodily injuries "caused solely by external, violent, and accidental means." Death by accident is defined to be "'death from any unexpected event, which happens as by chance, or which does not take place according to the usual course of things.' So a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence 'occasioned by external or material causes operating on the person of the insured'": 2 May on Insurance, 4th ed., sec. 514; United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. Rep. 755; North American etc. Ins. Co. v. Burroughs, 69 Pa. St. 51, 8 Am. Rep. 212; 1 Cyc. 248, and cases cited.

The evidence shows conclusively that the deceased was a strong and apparently healthy man of fifty-eight years, who had never been sick, and who was accustomed to lift from two hundred to two hundred and fifty pounds without difficulty; that immediately after he had made the lift of one end of the bar weighing from three hundred and fifty to four hundred pounds, he became sick and "deathly pale." His extremities became cold, and cold perspiration stood out on his face and hands. The exertion had caused a violent dilation of the

heart. The result certainly was unexpected. It did not take place according to the usual course of things. If, instead of a sprain of the muscles of the heart, the deceased had sprained the muscles of his back, or arm, or ankle, it certainly could not have been reasonably claimed that the result was not due to accident. The fact that the heart was dilated or ruptured was none the less an accident, according to the usual [136] acceptation of the term, and according to the definition above given. We think the evidence shows an accident within the meaning of the policy.

2. It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of deceased, and therefore the injury was one excepted from the policy. The evidence as stated above shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, and the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy. The rule is stated in 1 Cyclopedia 252, as follows: "The external and visible sign or mark required by the proviso that the policy will not cover 'any injury, fatal or otherwise, of which there is no visible mark upon the body,' need not necessarily be a bruise, contusion, laceration, or broken limb; it may be any visible evidence of an internal strain. Nor is it necessary that such evidence be present immediately after the happening of the accident": United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. Rep. 755; Thayer v. Standard etc. Ins. Co., 68 N. H. 577, 41 Atl. 182; Gale v. Mutual Aid etc. Assn., 66 Hun, 600, 21 N. Y. Supp. 893; Menneiley v. Employers' Liability Assur. Corp., 148 N. Y. 596, 51 Am. St. Rep. 716, 43 N. E. 54; Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482; Whitehouse v. Travelers' Ins. Co., 29 Fed. Cas. No. 17,566; Union Casualty etc. Co. v. Mondy (Colo.), 71 Pac. 677.

3. It is next claimed that the motion should have been [137] granted, because immediate notice of the accident was not given to the appellant as required by the policy. Immediate notice ordinarily means within a reasonable time and with due diligence under the circumstances of the particular case, of which the jury are ordinarily the judges: 2 May on Insurance,

4th ed., sec. 462; Remington v. Fidelity etc. Co., 27 Wash. 429, 67 Pac. 989; Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401.

No claim is made in this action for weekly indemnity under the policy. The evidence shows that the respondent caused notice to be sent to the appellant on the twelfth day after the death of her husband. Until the death of her husband she was not a claimant under the terms of the policy. This was not an unreasonable delay, and therefore it was the duty of the court to submit the question of reasonable time to the jury, which was properly done.

Finding no error in the record, the judgment is affirmed.

Fullerton, C. J., and Hadley, Anders and Dunbar, JJ., concur.

What is Death by Accidental Means within the meaning of the law of accident insurance is discussed in the monographic notes to Paul v. Travelers' Ins. Co., 8 Am. St. Rep. 763, 766; Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 859, 860. See, too, Keefer v. Pacific Mut. Life Ins. Co., 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822, and cases cited in the cross-reference note thereto. Death from a ruptured blood vessel, caused by heavy lifting in the course of the deceased's employment, will support an action on a policy of insurance against death from injuries sustained solely by external, violent and accidental means: Standard Life Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49. Overexertion as defeating a recovery on an accident insurance policy is passed upon in Rustin v. Standard Life etc. Ins. Co., 58 Neb. 792, 76 Am. St. Rep. 136, 79 N. W. 712

Immediate Notice of Accident, as required by an insurance contract, only, means notice within a reasonable time, and with due diligence, under the circumstances of the case: Ward v. Maryland Casualty Co., 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; Woodmen Accident Assn. v. Pratt, 62 Neb. 673, 88 Am. St. Rep. 777, 87 N. W. 546.

HIGHT v. BATLEY.

[32 Wash. 165, 72 Pac. 1034.]

INTERVENTION, When the Code Provides that it shall be made before the trial, cannot be allowed after final judgment has entered, and the parties are prosecuting an appeal therefrom. (p. 852.)

PRACTICE—Parties, Substitution of, Where the Action is One of Common or General Interest.—Though a suit purports to be brought by the plaintiff in his own behalf, and in behalf of other taxpayers, and citizens of a city, other taxpayers are not entitled, pending an appeal, to be substituted as parties in place of the plaintiff and to have a time fixed within which they may file a bond on appeal. (p. 853.)

James Kiefer, for the petitioner.

McCafferty & Kane, for the respondents.

165 HADLEY, J. An appeal was taken from the judgment below in this cause by both plaintiff and defendants. After the service and filing of the respective notices of appeal and appeal bonds, the parties entered into a stipulation whereby it was mutually agreed that the respective appeals should be withdrawn and that neither appeal should be further prosecuted. The plaintiff, A. W. Hight, brought the 166 suit in his own behalf and in behalf of other citizens and taxpayers of the city of Ballard. Following the stipulation and withdrawal of the appeals aforesaid, Robert J. Huston and Hattie E. Huston, his wife, as taxpayers and property owners of the city of Ballard, moved this court for an order either substituting them as plaintiffs and appellants in the cause, or permitting them to intervene as plaintiffs and appellants, and to prosecute the said appeal heretofore taken by said A. W. Hight. The motion also asks that a time shall be fixed within which said Huston and wife shall file an appeal bond and briefs upon said appeal, and that the stipulation entered into between said plaintiff and defendants for the withdrawal and dismissal of their said appeals shall be set aside.

This motion is made upon the theory that the questions involved in the suit are public ones, common to all the taxpayers of the city of Ballard, and that the plaintiff, in bringing his action, was litigating and waging public questions, in which all the taxpayers of said city were similarly interested. It is therefore urged that the movers in this motion, as taxpayers in

said city, are entitled to intervene or be substituted as parties plaintiff and appellant for the purpose of prosecuting said appeal inaugurated by the plaintiff in the action. It is conceded by counsel for the moving parties that the precise question presented here does not appear to have arisen in any of the reported cases. The right of intervention in this state is governed by statute, and under section 4846 of Ballinger's Code, the application to intervene must be made "before the trial." The trial of this cause was long since concluded, and appeals were taken. We are not aware of any other statute upon the subject which authorizes an intervention in the cause after an appeal has been taken to this court. It follows that the motion, [167] in so far as it asks leave to intervene, must be denied.

It will be further observed that the motion is alternative, to the effect that, if an intervention is denied, then these moving parties ask to be substituted as parties plaintiff and appellant. We are referred to section 4834 of Ballinger's Code, which provides as follows: "When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

Counsel also cite Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141, as having construed the above section of the statute. In that case a portion of the holders of the bonds secured by a trust deed brought a suit to foreclose the trust deed. There were numerous other bondholders, residing at a distance, who were unknown to the plaintiffs. It was held that, the question being one of common and general interest to many persons, the plaintiffs could, under the above statute, maintain the action for the benefit of all. The correctness of that decision is not disputed here, but no question as to the right of substitution in such cases arose in that action. It has been held that in a proper case new parties may be substituted in the appellate court: 20 Ency. of Pl. & Pr. 1068. We have examined the cases cited to support the above, and find that they were cases where a transfer of interest in the subject matter involved had occurred after the trial below, either by actual assignment or by operation of law. The substitution was therefore permitted in behalf of the real party in interest as successor of the original owner. There has, however, been no change of ownership or interest here. These moving parties have acquired no greater interest in the subject matter involved than they possessed at the time the action was commenced below, and no succession of

interest has [168] taken place. The authorities above referred to as being cited to support a substitution in the appellate court "in a proper case," being wholly unlike this case, we are of the opinion that this is not a proper case for such substitution.

If this case could be classified as a proper one for the substitution of new appellants in this court, we are then confronted with another difficulty which arises upon this motion. We are asked to fix a time within which an appeal bond may be filed by moving parties. In appeals from final judgments regularly entered the statute fixes the time as five days from the time the notice of appeal is given: Ballinger's Code, sec. 6505. If the notice is not given in open court at the time the judgment is rendered, it may be given within ninety days from the date of entry of final judgment: Ballinger's Code, secs. 6502, 6503. If these moving parties should be permitted to prosecute this appeal without giving a new notice, then the appeal would necessarily be based upon the original notice given by the plaintiff in the case. That notice was served March 10, 1903, and it is manifest that an appeal bond cannot now be filed under the statute to support the appeal taken by that notice, and the same was true at the time this motion was served. Again, if a new notice of appeal should now be given by the movers as substituted appellants, it would necessarily be after the expiration of ninety days from the entry of final judgment, which was also true when the motion was served. The decree was signed February 23, 1903, and filed on the twenty-seventh day of the same month. The motion was served June 9, 1903, which was after the full expiraton of the time within which an appeal could be taken. We know of no statutory authority under which a new notice of appeal or a new appeal bond could be entertained by this court at this time. The appeal cannot be prosecuted by these applicants [169] under the former bond given by the plaintiff, since it is conditioned only to pay costs and damages that may be awarded against the plaintiff himself on the appeal. This is conceded by the movers, inasmuch as they ask leave to file a new bond; but for the reasons stated we think such a bond would be ineffectual, and that they would have no appeal that could be prosecuted here, even if they should be formally substituted as appellants.

It is suggested that the withdrawal and dismissal of the plaintiff's appeal may have the effect to render the decree below res judicata as to the rights of these moving parties, and other taxpayers in the city of Ballard. Whether one who sues for

the common benefit of many can consent to such a disposition of the case as will become res judicata of the rights of others so commonly interested, is not now before us for determination. Questions of negligence or fraud, and possibly of special authority to sue or want of such authority, might be involved in such determination, and they are not now properly here for examination.

The motion is denied.

Anders, Mount and Dunbar, JJ., concur.

FULLERTON, C. J. In all that is said concerning the right of intervention and substitution I concur. As to what is said concerning the appeal bond I express no opinion.

An Application **to intervene must be made before the trial: See the monographic note to Brown v. Saul, 16 Am. Dec. 179, 180. A party cannot file a complaint in intervention after the defendant's default has been entered, and nothing remains to be done but the entry of the judgment: Safely v. Caldwell, 17 Mont. 184, 52 Am. St. Rep. 693, 42 Pac. 766. On acquiring jurisdiction of new parties, see the note to White v. Johnson, 50 Am. St. Rep. 737-742; and on the right of interpleader, see the note to Connecticut Mut. Life Ins. Co. v. Tucker, 91 Am. St. Rep. 593-614.**

STATE v. TIEMAN.

[32 Wash. 294, 73 Pac. 375.]

CONSTITUTIONAL LAW—Statutes, Title of.—A Penal Code May be Enacted under the title "An act relative to crimes and punishments and proceedings in criminal cases," including anything relating to crimes and their punishments and proceedings of a criminal nature, but not provisions of a civil nature, though every law is required to embrace but one object which shall be expressed in its title. (pp. 855, 856.)

CONSTITUTIONAL LAW—Penal Codes May not Authorize Civil Proceedings.—A Bastardy Proceeding, being an action commenced and prosecuted in the ordinary manner of civil actions, and which may result in a judgment charging the defendant with the support of the child, to be enforced by execution, is not a criminal proceeding, and hence cannot be authorized in a penal code, if every statute must embrace but one object which must be expressed in its title. (p. 857.)

PARENT AND CHILD—Obligation to Support Illegitimate.—At the common law a father was not under any obligation to support his illegitimate child. (p. 857.)

Thomas Smith, for the appellant.

J. C. Waugh and M. P. Hurd, for the state.

295 FULLERTON, C. J. This is a bastardy proceeding, begun in the superior court of Skagit county by one John Jungquist, who alleged in his complaint that an unmarried woman (naming her) was pregnant with child, which, if born alive, would be a bastard, and charged the appellant with being the father of such unborn child. Summons was duly issued and served on the appellant, after which he appeared in the action and demurred to the complaint on various grounds, some of which went to the jurisdiction of the court. On his demurrer being overruled, he pleaded not guilty, and a trial was had, resulting in a verdict of guilty, on which he was adjudged to make a monthly payment to the mother of the child for the child's support. He appeals from the judgment entered against him.

The act under which the proceedings against the appellant were had first appears on the statute books in the Code of 1881. It was enacted by the territorial legislative assembly of that year as a part of a general penal code under the title, "An act relative to crimes and punishments and proceedings in criminal cases." The act was the second of a series of four, intended to form a general code, the others being denominated a "code of civil procedure," a "probate practice act," and a "justices' practice act." The sections of these several acts were numbered consecutively in the enrolled bills throughout the entire series, those of 296 the Penal Code being numbered from 764 to 1296, inclusive, and the particular act in question being sections 1214 to 1221 of that code. The contention of the appellant is that this act was never legally enacted, because the title of the bill of which it formed a part was not broad enough to include it.

The act of Congress (Act March 2, 1853, c. 90, sec. 6; 10 Stats. at Large, 175) providing for the organization of the territory of Washington empowered its legislative assembly to legislate upon all rightful subjects of legislation not inconsistent with the constitution or laws of the United States, but provided that "every law shall embrace but one object, and that shall be expressed in the title." Construing a similar provision in the state constitution, this court held in Marston v. Humes, 3 Wash. 267, 28 Pac. 520, that under the title, "An act to provide a code of civil procedure," it would be legal for the legislature to enact an entire civil code, although such an

act would include numerous subheads and subjects; saying that "the legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division." Tested by this rule, it is clear that it was competent for the legislature, under the title which it adopted for the act in question, to include in the body of the act anything which related to crimes and their punishment and proceeding of a criminal nature; but it is equally clear, also, that under such a title provisions of a civil nature cannot be legally enacted. Whether, therefore, the particular act in question is a valid or invalid enactment depends upon what answer is given to the question, is it a criminal proceeding? Looking to the statute itself, it seems to contain none of the elements of [297] a criminal proceeding. The action is commenced by the filing of a complaint, and the defendant is brought in by the service of a summons in the usual method, and the issue, if one is made, is tried as an ordinary civil action. If the accused is found guilty, a judgment is entered, charging him with the support of the bastard child in such sum or sums, and payable in such manner, as the court shall direct, which is collected by the execution issued by the clerk. The proceeding must be instituted before the superior court. There is no preliminary complaint, no arrest, no fine or punishment of any kind whatever, inflicted as punishment, and the court is specially given power to "at any time enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated on such notice to the defendant as the court or judge may prescribe." Plainly, the proceeding has but one purpose, namely, to charge the property and earnings of a father with the maintenance of his illegitimate child—a proceeding which, from its very nature, must be civil, as it operates against property, and not against the person. Courts of states having the same or similar statutes hold with uniformity that the statute gives rise to a civil, and not a criminal, liability. In Iowa, which has a statute so near the counterpart of our own as to lead to the belief that ours was taken therefrom (see Code 1873, sec. 4715 et seq.; Code 1897, sec. 5697 et seq.), the courts have uniformly held that proceedings thereunder were civil, and not criminal: Holmes v. State, 2 G. Greene, 501; Black Hawk County v. Cotter, 32 Iowa, 125; State v. Pratt, 40 Iowa, 631; McAndrew v. Madison County, 67 Iowa, 54, 24 N. W. 590; State v. Severson, 78 Iowa, 653, 43 N. W. 533; State v.

Johnson, 89 Iowa, 1, 56 N. W. 404. And in Nebraska where the statute provides the remedy of [298] arrest and imprisonment for the purpose of enforcing the judgment rendered, it is held that the proceeding is essentially a civil, and not a criminal, action: In re Application of Walker, 61 Neb. 803, 86 N. W. 510. See, under similar statutes: Powell v. State, 96 Ind. 108; Reynolds v. State ex rel. Cooper, 115 Ind. 421, 17 N. E. 909; In re Cannon, 47 Mich. 481, 11 N. W. 280; People v. Harty, 49 Mich. 490, 13 N. W. 829; Scharf v. People, 134 Ill. 240, 24 N. E. 761; Young v. Makepeace, 103 Mass. 50; Williams v. State, 117 Ala. 199, 23 South. 42; Chambers v. State, 45 Ark. 56. While there are courts which hold that the object of the statute is as much to punish the father as it is to protect the state from the child's support, and that the action is, therefore, criminal in its nature, they are usually in jurisdictions where the statutes provide a punishment for the putative father in addition to providing for the child's support. In jurisdictions where the statutes furnish only a scheme to compel the putative father to support the child, they are almost uniformly held to provide a civil remedy. We are constrained to hold, therefore, that the statute in question could not lawfully be enacted as part of a general enactment having for its title a reference to criminal objects and procedure only, and that it is not, and never was, a valid enactment.

It is said, however, that this conclusion does not necessarily render the judgment appealed from void, because the judgment can be sustained under the common-law obligation of a father to support his child. But in the absence of a statute there is no legal obligation on the part of a putative father to support his illegitimate child. At the common law a bastard was nullius filius, and was incapable of inheriting either from his putative father or [299] his mother, and, as that law was administered in England, neither a father nor mother was under any legal obligation to support an illegitimate child. The obligation was imposed on the mother by statute, but then only until the child reached the age of sixteen years, or acquired a settlement, and the mother remained unmarried: See 4 & 5 William IV, c. 76, sec. 71; 5 Cyc. 638. In some of the states of the Union the English rule with reference to the mother has not been followed, but, so far as we are advised, it is universally held that a statute must be found imposing the obligation on the putative father before he can be charged with the child's support.

The judgment appealed from is reversed, and the cause remanded, with instructions to enter a judgment dismissing the action.

Hadley, Anders and Mount, JJ., concur.

Broadness of Title as affecting the validity of the enactment or amendment of codes is discussed in the monographic note to Crookston v. County Commissioners, 79 Am. St. Rep. 482-485; Lewis v. Dunne, 86 Am. St. Rep. 267-279; and see the subsequent case of State v. Superior Court, 28 Wash. 317, 92 Am. St. Rep. 831, 68 Pac. 957.

As to Whether Bastardy Proceedings are civil or criminal, see the monographic notes to Weatherford v. Weatherford, 56 Am. Dec. 212, 213; State v. Brewer, 37 Am. St. Rep. 762. A father is under no legal obligation, in the absence of a statute, to support his illegitimate child: Simmons v. Bull, 56 Am. Dec. 257, and note.

STATE v. GARDNER.

[32 Wash. 550, 73 Pac. 690.]

MANDAMUS Lies to Compel a Sheriff to Release Property Exempt from Attachment.—The remedy by replevin or claim and delivery is not sufficiently speedy and adequate. (p. 860.)

EXEMPTION—Waiver of by Delay or Resort to Other Remedy.—The exemption of property from attachment is not waived by a motion to dissolve the attachment, nor by mere delay in making a claim, provided it is made within a reasonable time before the sale. (p. 861.)

E. A. Hesseltine and Myers & Warren, for the appellant.

Martin & Grant, for the respondent.

551 HADLEY, J. This is a mandamus proceeding to compel the sheriff of Lincoln county to release to the relator certain personal property which has been seized by the sheriff and taken into his possession by virtue of a writ of attachment. The attachment writ was issued in an action wherein one Parrish was plaintiff and the relator was defendant. In the attachment proceeding the relator here, as defendant therein, appeared, and moved for the dissolution of the attachment and for the release of the property. The motion was denied, and the relator appealed to this court 552 from the order denying the motion. Said appeal is still pending and undetermined.

After taking the appeal, the relator under oath made and delivered to the sheriff a list of all his personal property, and at the same time and place he delivered to him an itemized list of all his personal property claimed by him to be exempt, and demanded the release of the same, which was refused. After a period of about twenty days from the presentation of said lists and the making of said demand this proceeding was commenced. The trial court issued an alternative writ of mandate, and at the hearing, after considering the evidence, found that the relator is entitled to the release of certain property as exempt. A peremptory writ of mandate was ordered, directing the said sheriff and his successore in office to forthwith deliver such exempt property to the relator. This appeal is from that judgment.

The appellant urges that the motion to quash the alternative writ should have been sustained, for the reason that the relator had an adequate remedy by replevin. Under section 5756 of Ballinger's Code, the writ of mandate must be issued in all cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law." It is insisted that such a remedy existed, and that the writ was improperly issued. Whatever might be said of this as an original question, this court has already upheld mandamus as a proper proceeding in such a case: State v. Creech, 18 Wash. 186, 51 Pac. 363. Appellant suggests that the opinion in that case does not disclose that the propriety of the remedy by mandamus was challenged, but that it rather appears that the contest was concerning the right of an abandoned wife to claim exemptions of community property in the absence of her husband. We have examined the briefs submitted in that [553] case and find that the exact point raised here was urged then. It was insisted that State ex rel. Gannon v. Hitt, 13 Wash. 547, 43 Pac. 638, was decisive that mandamus would not lie in the case then before the court. But the court took the view that the remedy by replevin or claim and delivery was not sufficiently speedy and adequate. The opinion is short, and does not enlarge upon the reasons which led the court to its decision upon that branch of the case. It may be added, here, however, by way of argument in support of the rule adopted then, that in an action of replevin the claimant must give a bond in order to procure an immediate delivery of the property, and even then the person in possession may retain the same by giving a redelivery bond: Ballinger's Code, secs. 5420, 5422.

The object of the exemption statutes is to accord to the householder the immediate possession and use of the exempt property for the benefit of the family. It may well be said that replevin does not furnish a speedy remedy, since it may result in withholding possession until the end of an extended litigation, during which time the family is deprived of that which the law intends shall be uninterruptedly held for its use. In any event, however, we shall not depart from the rule adopted in the former case.

Mandamus will lie "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station": Ballinger's Code, sec. 5755. What was the duty of the sheriff in the premises? The relator had complied with the provisions of section 5255 of Ballinger's Code, in furnishing to the officer a list of all his personal property, and also of that which he claimed as exempt. The same section gave to the attaching creditor the right to have the property appraised, but it appears that no demand was made for an appraisement. No time is fixed within which such demand shall be made, and a reasonable [554] time must, therefore, have been intended. Twenty days had elapsed in this case, which was certainly more than a reasonable time. Referring to the property claimed as exempt, the same section provides that "the property therein specified shall be exempt from levy and sale." No appraisement having been demanded to test the accuracy of the specified exemptions, the property was, therefore, exempt from levy, and it became the manifest duty of the officer to release it from the levy under which he held it. At the trial, upon the return to the alternative writ, the court also heard evidence as to the vocation, married relation, and residence of the relator, and the character of the property claimed as exempt. From the facts found, the exemptibility of the property described in the court's judgment was determined, and from the evidence in the record we shall not disturb the findings or the conclusions thereon.

It is next urged that the relator waived his claim to exemption by reason of appearing and moving to dissolve the attachment without first making claim for the exemption. No time is specified in the statute when the claim for exemption shall be made. In Wiss v. Stewart, 16 Wash. 376, 47 Pac. 736, this court held that, even under the law of 1895, requiring a formal record declaration of homestead, the same may be selected at

any time before sale, saying: "The latter act in no way affects the provision in relation to the time of making the selection, but simply undertakes to direct the manner of such selection, and the provision that such homestead may be selected at any time before sale is still in effect."

By analogy we think a similar rule should apply to exemptions of personal property, and that the claim may be made within any reasonable time before sale. This [555] seems to be a wholesome rule for the protection of the family. Circumstances might arise where the actual seizure of the property might not be known until near the time of sale. When there has been no express waiver, and no conduct that must lead to the conclusion that a waiver was intended, the right may be exercised at any time before sale.

"Waiver, it has been said, is a question of intention, to be determined as a fact. Conduct or consent, therefore, to show a waiver, should be inconsistent with an intention to claim exemptions. This proposition is not laid down in express terms in any reported case, but it is clearly sustained by the decisions": 12 Am. & Eng. Ency. of Law, 2d ed., 197.

We are unable to see that the prompt effort to dissolve the attachment was inconsistent with an intention to claim exemptions. It may rather be said to have been consistent therewith, since we must assume that the relator in good faith believed the attachment should be dissolved for legal reasons, and that no claim of exemption would be necessary as against a wrongful attachment. When the attachment was, however, at least temporarily held good by the refusal to dissolve it on motion, the claim for exemption was made. We think the relator's course was not a waiver of his right to exemption.

The judgment is affirmed.

Mount and Dunbar, JJ., concur.

ANDERS, J., concurring. Were it not for the former rulings of this court to the effect that an officer holding property under a valid writ, and which is claimed by the debtor as exempt from seizure and sale, may be compelled to deliver the same to such debtor, I should feel strongly inclined to hold that the judgment ought to be reversed, [556] for the reason that the delivering of this property by the sheriff to the relator is not, under the admitted facts in this case, "an act especially en-

joined by law," and therefore not enforceable by mandamus. The language of the law prescribing the duty of the sheriff in cases like this is as follows: "In case no appraisement be required, the officer shall return with the process the list of the property claimed as exempt by the debtor": Ballinger's Code, sec. 5255.

And in view of that provision of the statute, it is somewhat difficult for me to see how the sheriff could be peremptorily commanded to release the property held by him under the writ of attachment. But, inasmuch as it seems to have been heretofore decided by this court that mandamus is a proper remedy in cases like the one at bar, I am constrained to concur in the opinion written by Judge Hadley.

FULLERTON, C. J., dissenting. Inasmuch as this court has heretofore adopted the rule that mandamus will lie to compel an officer who has levied upon personal property of a judgment debtor to turn back to such debtor the property which he has the right to claim and does claim as exempt, and inasmuch as the merits of such a controversy can be tried under the statutory writ of mandamus, I am willing to adhere to the rule so adopted, notwithstanding I think it an application of the writ not warranted by the common law, nor contemplated by the statutes. I cannot assent, however, to the second position taken in the opinion, namely, that section 5255 of Ballinger's Code furnishes an exclusive remedy for contesting the validity of an exemption claim where the value of the property claimed is all that is in contest. The statute cited does not in terms provide that the remedy therein provided for shall be exclusive 557 of this question, and, as was said by this court in Christ Church v. Beach, 7 Wash. 65, 33 Pac. 1053, quoting from Sutherland on Statutory Construction: "Where a statute gives a new remedy for a right existing and enforceable either at common law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two." This being the rule, the judgment creditor, through the officer levying the writ, had a right to contest the validity of the debtor's claim to the property by showing at the hearing on the writ that it grossly exceeded in value the amount allowed as exempt under the statute. As the trial court refused to allow him to contest the claim on this ground, I think the judgment should be reversed.

WHEN MANDAMUS IS THE PROPER REMEDY AGAINST PUBLIC OFFICERS.*

I. Writ of Mandate in General.
- a. Definition and Prerequisites for Its Issuance.
- b. Right must be Clear.
- c. What Degree of Interest Sufficient to Obtain Writ.
- d. What Degree of Interest Sufficient to Bar Issuance of Writ.
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- e. Does not Create New Duties.
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II. Against Ministerial Officers and Boards.
- a. Controls Ministerial, but not Discretionary, Acts.
- b. Clerical Officers.
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- c. Tax Collectors.
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- e. Sheriffs and Constables.
  - 1. In General.
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- f. Land Officers.
- g. Patent and Pension Officers.
- h. Heads of Executive Departments.
- i. Compelling Officials to Attend Meetings.
- j. Examination of Public Records.
- k. Award and Performance of Public Contracts.
- l. Laying Out and Repairing Streets, Roads and Bridges.
- m. Issuance and Revocation of Licenses and Certificates.
  - 1. For Professions and Occupations.
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- n. Management of Schools.
  - 1. In General.
  - 2. Admission of Children to Public Schools.
  - 3. Reinstatement of Pupil Wrongfully Suspended.
  - 4. Recognition of Teacher Illegally Removed.
- o. Auditing and Allowing Claims.
- p. Drawing Warrants.
- q. Payment of Claims.
  - 1. Where Liquidated and Ascertained.
  - 2. Where Unliquidated.
  - 3. Existence of Other Adequate Remedies.
  - 4. Where Doubtful and Disputed.
  - 5. Payment of Official Salaries and Fees.
- r. Levying Tax to Meet Obligations.

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*REFERENCES TO MONOGRAPHIC NOTES.

Restoring officers unlawfully removed: 12 Am. Dec. 28.
Does not lie to try title to office: 12 Am. Dec. 28.
Law of mandamus: 89 Am. Dec. 728.
Mandamus against the governor: 33 Am. Dec. 361; 31 Am. St. Rep. 294.
How responsible bidders may enforce their rights: 50 Am. St. Rep. 489.

s. Issuance of Bonds and Payment of Interest Thereon.
t. Trying Title to Public Office by Mandamus.
1. Generally not Lie.
2. Cases in Which It has been Allowed.
3. Delivery of Books, Records and Insignia of Office.
u. Matters Dealing with Elections.
1. Issuing Certificate of Election.
2. Admission to Office and Recognizing Official Status.
3. Reinstating Officer Illegally Removed.
4. Will not Lie to Restrain Person from Qualifying, or from Disturbing an Officer.
5. Filing Ticket of Political Party and Entering Nominee's Name Thereon.
6. Powers and Duties of Canvassing Boards.
v. Compelling Holding of County Office at County Seat.
III. Judicial Officers and Tribunals.
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z. Criminal Proceedings.

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2. Habeas Corpus Proceedings.
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II. Miscellaneous Instances.

I. Writ of Mandate in General.

a. **Definition and Prerequisites for Its Issuance.**—Mandamus, or the writ of mandate is a writ issuing out of a court, directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, there being no other adequate, specific remedy at law: Kendall v. United States, 37 U. S. (12 Pet.) 524. There are, therefore, two prerequisites essential to the issuance of the writ: first, a clear and specific legal right sought to be enforced; and second, no other legal remedy adequate to afford the desired relief: Ex parte Jones, 1 Ala. 15; Murphy v. State, 59 Ala. 639; Ex parte Trapnall, 6 Ark. 9, 42 Am. Dec. 676; Fitch v. McDiarmid, 26 Ark. 482; Territory v. Cavanaugh, 3 Dak. 325, 19 N. W. 413; Wright v. Kelly, 4 Idaho, 624, 43 Pac. 565; Boone Commrs. v. State, 38 Ind. 193; State v. Herron, 29 La. Ann. 848; Alger v. Seaver, 138 Mass. 331; People v. Judges, 1 Doug. (Mich.) 302; State v. Gillespie, 9 Neb. 505, 4 N. W. 239; State v. Kincaid, 23 Neb. 641, 37 N. W. 612; Morgan v. Monmouth etc. Road Co., 26 N. J. L. 99; Cleveland v. Board of Finance, 39 N. J. L. 629; Hugg v. Ivins, 59 N. J. L. 139, 36 Atl. 685; People v. Oneida Common Pleas, 21 Wend. 20; People v. Green, 1 Hun, 1; In re Gardner, 68 N. Y. 467; State v. Justices, 24 N. C. (2 Ired.) 430; Cincinnati etc. R. Co. v. Clinton County Commrs., 1 Ohio St. 77; Ball v. Lappius, 3 Or. 55; Councils of Reading v. Commonwealth, 11 Pa. St. 196, 51 Am. Dec. 534; James v. Bucks County Commrs., 13 Pa. St. 72; Commonwealth v. Colley Township Supervisors, 29 Pa. St. 121; In re White River Bank, 23 Vt. 478; Sabine v. Rounds, 50 Vt. 74; Ex parte Goolsby, 2 Gratt. 575.

b. **Right Must be Clear.**—The right sought to be enforced must be clear and well defined, and, if its existence is doubtful, the writ will be denied: Peck v. Booth, 42 Conn. 271; People v. Village of Crotty, 93 Ill. 180; State v. Buhler, 90 Mo. 560, 3 S. W. 68; State v. Omaha, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210; Vreeland v. Jacobus, 26 N. J. L. 135; People v. New York etc. Asylum, 122 N. Y. 190, 25 N. E. 241; Foster v. Angell, 19 R. I. 285, 33 Atl. 406; Ex parte Barnwell, 8 S. C. 264; and the party sought to be coerced must be bound to act: People v. Hatch, 33 Ill. 9.

c. **What Degree of Interest Sufficient to Obtain Writ.**—The question of the degree of interest required to obtain the issuance of the writ was discussed in Wise v. Bigger, 79 Va. 269, the court quoting with approval from High on Extraordinary Legal Remedies, section 431, where it is said: "As regards the degree of interest on the part of the relator, requisite to make him a proper party, on whose in-

formation the proceedings may be instituted, a distinction is taken between cases where the extraordinary aid of mandamus is invoked, merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest. And while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition, that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter, since he is regarded as the real party in interest, and his rights must clearly appear. On the other hand, where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws: County of Pike v. State, 11 Ill. 202; City of Ottawa v. People, 48 Ill. 233; Hamilton v. State, 3 Ind. 452; People v. Collins, 19 Wend. 56; Hall v. People, 57 Ill. 307; People v. Halsey, 37 N. Y. 344; State v. Marshall County Judge, 7 Iowa, 186."

d. What Remedy Sufficient to Bar Issuance of Writ.

1. **In General.**—The rule being that mandamus is not the proper remedy where adequate relief may be afforded by another legal remedy, it becomes necessary to determine what is such remedy as will bar the right to the issuance of this writ. In the first place, the action must be one at law, and the existence of an equitable remedy is not grounds for refusing mandamus: Commonwealth v. Allegheny County Commrs., 32 Pa. St. 218. And it must be against the defendant himself and not some third person: Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

It must be adequate to afford complete relief: Tennessee etc. R. Co. v. Moore, 36 Ala. 371; State v. Wright, 10 Nev. 167; not obsolete and inoperative: King William Justices v. Munday, 2 Leigh, 165, 21 Am. Dec. 604; Page v. Clopton, 30 Gratt. 415. Not only must it be adequate, but specific: In re Trustees of Williamsburgh, 1 Barb. 34; and if there be a reasonable doubt as to its certainty, the writ should issue: Clark v. Miller, 47 Barb. 38; People v. Treanor, 15 App. Div. 508, 44 N. Y. Supp. 528. The fact that a different writ of mandate would lie to accomplish the result will not bar the one applied for, the remedy required by the rule applying only to different legal actions: United States v. King, 74 Fed. 493.

In accordance with the rule, it has been held that the writ would not issue to compel the payment of a mayor's salary, an action at law affording adequate relief: People v. Thompson, 25 Barb. 73; nor would it to compel a clerk to issue execution, where a statute provided that for good cause shown, a judge might direct any of the

officers of the court in relation to the discharge of their duties: Pickell v. Owen, 66 Iowa, 485, 24 N. W. 8. So where an action may be brought on an award, the writ will not issue to enforce payment: Elmendorf v. Jersey City, 41 N. J. L. 135; nor where a motion to strike out will accomplish the desired end: People v. Adams, 13 Colo. 550, 22 Pac. 826. And it will not lie to correct certain erroneous accounts where the petitioner has ample remedy in his right to make defense to any suit that may be brought against him thereon: State v. Brewer, 61 Ala. 318.

Where an act provides that mandamus will lie in all cases where it affords an appropriate remedy for the enforcement of a legal right without regard to whether there may be some adequate remedy or not, the general rule does not, of course, apply: People v. Village of Crotty, 93 Ill. 180.

The question as to how far the right to mandamus extends where appeal or writ of error lie is discussed herein, III, c.

2. **Effect of Liability to Indictment.**—If the obligation to act on the part of the officer is clear and undoubted, the fact that an indictment will lie for failure to perform that duty furnishes no objection to granting a writ of mandate: Inhabitants of Brunswick v. City of Bath, 90 Me. 479, 38 Atl. 532; People v. State Ins. Co., 19 Mich. 392; In re Trenton Water Power Co., 20 N. J. L. 659; State v. Whitworth, 76 Tenn. (8 Lea) 594.

3. **Effect of Liability on Bond.**—There is a conflict among the authorities as to how far an action upon the official bond of the office for nonfeasance will bar the right to mandamus. In Goodwin v. Glazer, 10 Cal. 333, and Gooch v. Gregory, 65 N. C. 142, the court held that the writ would not lie against the clerk of a court to compel him to issue execution on a money judgment, as there was an action on his bond available: See, however, People v. Loucks, 28 Cal. 68. And for the same reason the writ was refused to compel the execution of a writ by a sheriff: Habersham v. Sears, 11 Or. 431, 50 Am. Rep. 481, 5 Pac. 208; and the payment of money wrongfully retained by a probate judge: State v. Meiley, 22 Ohio St. 534.

Mandamus may lie, however, though the officer is liable on his bond: People v. Loucks, 28 Cal. 68; State v. Dougherty, 45 Mo. 294. So it lies at the instance of a state treasurer to compel a county treasurer to transfer to the state treasury the state's proportion of taxes collected by the county treasurer, for, although the full amount of damages might be recovered on the bond, it would leave in the county treasury the fund to which the state is entitled, and to which the county treasury is not entitled: State v. Staley, 38 Ohio St. 259.

In Fremont v. Crippen, 10 Cal. 212, 70 Am. Dec. 711, mandamus was awarded to compel a sheriff to execute a writ of restitution. It was objected that the plaintiff's remedy was by action on his bond, but the court said: "This objection is not well taken; the statute provides that a mandamus may issue 'to any inferior tribunal, board,

or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station," and shall issue in all cases when there is not a plain, speedy, and adequate remedy in the ordinary course of law.

"Now, the execution of final process is specially enjoined by law on defendant as a duty resulting from his office of sheriff, and in our opinion the plaintiff in this case has no plain, speedy, or adequate remedy in the ordinary course of law. It is true, he might sue defendant on his bond for the damages resulting from the nonperformance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy.

"To supersede the remedy by mandamus, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application.

"Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by mandamus, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial, and effectual": See, also, Babcock v. Goodrich, 47 Cal. 488; Prescott v. Gonser, 34 Iowa, 175; Jones Co. v. Town of Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

Other authorities consider cases of this kind as an exception to the general rule, and hold that although generally mandamus will not issue where the party has another remedy, it is not universally true as regards corporations and ministerial officers, for while they may be liable in an action for neglect of duty, they may still be compelled by this writ to exercise their functions according to law: McCullough v. Mayor, 23 Wend. 458; Buck v. City of Lockport, 6 Lans. 251; Adriance v. New York County Supervisors, 12 How. Pr. 224; People v. City of New York, 59 How. Pr. 277; People v. Palmer, 14 Misc. Rep. 41, 35 N. Y. Supp. 222.

4. **Where the Other Remedy is Lost Through Laches.**—In order to bar the issuing of the writ, it is not necessary that the other remedy be available at the time of applying for the mandamus, but if the petitioner had a clear legal remedy, adequate to enforce his rights, of which he failed to avail himself and which he lost through his own neglect, the writ will not lie: Simpson v. Kansas City, 52 Kan. 88, 34 Pac. 406; Granger v. Judge, 44 Mich. 384, 6 N. W. 848; Jordan v. Board of Education, 14 Misc. Rep. 119, 35 N. Y. Supp. 247, 25 Civ. Proc. Rep. 89, 2 N. Y. Ann. Cas. 244.

e. **Does not Create New Duties.**—This writ does not create duties and compel their performance, but compels the performance of duties the law has already created: State v. Brewer, 62 Ala. 215; State v. Buhler, 90 Mo. 560, 3 S. W. 68. Therefore, it does not lie to compel an officer to do that which it is not lawful for him to do without such mandate: Clark v. Buchanan, 2 Minn. 346; Johnson v. Lucas, 30

Tenn. (11 Humph.) 306. So it was denied where it was sought to compel a probate judge to file and record a sheriff's bond, approved by an officer who had no authority to do so: Cook v. Candee, 52 Ala. 109.

f. **Not Granted Where Unavailing.**—It is not the proper remedy where the act, the performance of which is sought to be coerced, is no longer within the power of the officer to perform and the writ, if granted, would be unavailing and nugatory: Rice v. Walker, 44 Iowa, 458; State v. Cavanac, 30 La. Ann. 237; Public School Commrs. v. Allegheny County Commrs., 20 Md. 449; Spiritual etc. Soc. v. Selectmen of Randolph, 58 Vt. 192, 2 Atl. 747. Nor does it lie to compel the undoing of an act already done: Maxwell v. Burton, 2 Utah, 595.

g. **Not Granted Where Long Accounts or Rights of Third Persons Involved.**—Where long and complicated accounts are involved, mandamus is not the appropriate remedy: Board of Education v. Spencer, 52 Kan. 574, 35 Pac. 221; nor is it where it will, in a collateral manner, decide questions of importance between persons not parties to the proceedings, and who have had no opportunity to interpose their defense: Ex parte Du Bose, 54 Ala. 278.

II. Against Ministerial Officers and Boards.

a. **Controls Ministerial, but not Discretionary, Acts.**—To enforce the discharge by public officers of specific ministerial duties required of them by law and not involving the use of discretion, mandamus is the proper remedy: Ex parte Shandies, 66 Ala. 134; State v. Bordelon, 6 La. Ann. 68; Savage v. Holmes, 15 La. Ann. 334; State v. New Orleans, 41 La. Ann. 156, 6 South. 592; Beaman v. Board of Police, 42 Miss. 237; State v. Kendall, 15 Neb. 262, 18 N. W. 85; Jones Co. v. Town of Guttenberg, 66 N. J. L. 659, 51 Atl. 274; Bennett v. Commissioners, 125 N. C. 468, 34 S. E. 632; Meadows v. Nesbit, 80 Tenn. (12 Lea) 486; Johnson v. Campbell, 39 Tex. 83; Commissioners of Patents v. Whiteley, 71 U. S. (4 Wall.) 522. In Cassidy v. Young, 92 Ky. 227, 17 S. W. 485, it is said: "A ministerial duty on the part of a public officer, the performance of which may be compelled by mandamus, is a mandatory duty imposed by law or which arises necessarily as an incident to the office and about the performance of either he has no discretion, though he is compelled to exercise judgment in the performance of it. But if judgment and discretion are to be exercised as to how the duty shall be performed, then such duty is both judicial and ministerial and a mandamus lies to compel the officer to act in the premises, but not to control his judgment and discretion." For additional authorities to the effect that the writ lies to compel the exercise of discretion, but not to control the judgment of the officer or tribunal, see Jacobs v. Superior Court, 100 Cal. 121, 34 Pac. 630; Seymour v. Ely, 37 Conn. 103; People v. Trustees of Schools, 42 Ill. App. 60. It is laid down in many of the cases to be the law that mandamus will not be

granted to govern or control discretion: Ex parte South etc. R. Co., 44 Ala. 654; Towle v. State, 3 Fla. 202; Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791; Wise v. Bigger, 79 Va. 269. It will therefore not lie to compel the attorney general to bring quo warranto proceedings as acting in such matters rests within his discretion: People v. Fairchild, 67 N. Y. 334, affirming 8 Hun, 334. See, also, Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707. A more exact statement of the rule, however, is that, if the case be otherwise proper, the writ will issue to control discretion which has been abused: Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; Council of Glencoe v. People, 78 Ill. 382; Illinois State Board v. People, 123 Ill. 227, 13 N. E. 201, affirming 20 Ill. App. 457; Lynah v. Commissioners of Poor, 2 McCord (S. C.) 170. See, also, Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791.

The fact that judgment is required in the performance of an act does not stamp it as one requiring the exercise of discretion, and this is clearly pointed out in Morley v. Power, 73 Tenn. (5 Lea) 691, the court saying: "The rule undoubtedly is that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. But that character of discretion only exists when the law has given the power to decide, with the intent that the decision shall be final unless changed by appeal or review. It does not exist when the act to be done is ministerial upon a given state of facts, although the officer or tribunal or body must judge, according to their best discretion, whether the facts exist, and whether they should perform the act. For, otherwise, it is obvious no mandamus would ever lie in any case." That mandamus does not lie to enforce the doing of an act which by law lies in the discretion of the officer refusing to do it, see People v. Auditor General, 36 Mich. 271. The fact that certain details of the work are left to the discretion of the authorities does not constitute a bar to relief by mandamus: Peotone etc. Dist. v. Adams, 61 Ill. App. 435.

b. Clerical Officers.

1. Various Duties.—To compel the performance of ministerial duties on the part of clerical officers, there is no doubt that mandamus will lie, such as the delivery of transcripts on writs of error: Davis v. Carter, 18 Tex. 400; the recording of an instrument which it is made his duty by law to record: Wulftange v. McCollom, 83 Ky. 361; the issuance of execution: Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194; see, also, Moore v. Muse, 47 Tex. 210; or an alias summons: People v. Leask, 1 Abb. N. C. 299; the affixing of the official seal to an instrument requiring it: Prescott v. Gonser, 34 Iowa, 175; People v. Connolly, 2 Abb. Pr., N. S., 315. It has been held that the writ would lie to compel a county clerk to extend a school tax upon

the tax books according to the estimates furnished him by the district directors, such being a ministerial act: State v. Byers, 67 Mo. 706. See, also, Waupaca County v. Town of Matteson, 79 Wis. 67, 48 N. W. 213.

2. **Passing on Bonds.**—In deciding as to the sufficiency of sureties on a bond, a clerk acts quasi judicially, and is not subject to mandamus: McDuffie v. Cook, 65 Ala. 430. But it does lie to compel him to act thereon: Mobile Mut. Ins. Co. v. Cleveland, 76 Ala. 321, where the court said: "If, however, the clerk refuses to consider the sufficiency of a bond tendered for his approval, either for no reason, or for an assigned insufficient reason, mandamus will lie—not to compel him to approve the bond; that is a matter for his own enlightened judgment; it will lie to compel him to consider and pronounce on the sufficiency of the bond. This involves an inquiry into its form, whether it is in proper penalty and condition, and whether the sureties tendered are sufficient. This is a duty cast on him which he alone can perform, and suitors who may be required to give such bonds have the clear legal right to demand its exercise." So where he admits the bond to be good and sufficient, he may be required by mandamus to approve and file it: Daniels v. Miller, 8 Colo. 542, 9 Pac. 18. See, also, Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49; Copeland v. State, 126 Ind. 51, 25 N. E. 866; State v. Stockwell, 7 Kan. 103; Speed v. Common Council, 97 Mich. 198, 56 N. W. 570.

3. **Court Stenographer.**—The writ lies to compel the writing out of exceptions occurring during a trial by a court reporter: State v. Supple, 22 Mont. 184, 56 Pac. 20.

c. **Tax Collectors.**—A tax collector may be forced by mandamus to collect a tax duly levied: State v. Tyler, 48 Conn. 145; and to furnish to another tax collector a complete list of all unpaid taxes, where such duty is enjoined upon him by law: Kings County v. Johnson, 104 Cal. 198, 37 Pac. 870. In People v. Registrar of Arrears, 114 N. Y. 19, 20 N. E. 611, the owner of certain property called at the office of the registrar of arrears, asked for the bills for taxes against his property, stating he wanted to settle up. The clerk in charge gave him bills for taxes for certain years, which he paid, but omitted to give a bill for the year last past, on account of which unpaid taxes the property was subsequently sold. As soon as he learned of this, the owner tendered the registrar the amount of the tax, and upon his refusal to accept it, brought mandamus proceedings to compel the acceptance thereof and the cancellation of the sale. The court held that it was the duty of the registrar, under the city charter, to furnish a correct statement of unpaid taxes, and that the writ should be granted.

d. **Treasurers.**—A board of education is entitled to mandamus to compel its treasurer to pay its funds to the proper depositary under

the law: Board of Education of Port Huron v. Runnels, 57 Mich. 46, 23 N. W. 481. It also lies to compel a state treasurer to apply money deposited with him by a corporation in discharge of certain encumbrances, which he agreed to do when he received the money: State v. Stephens, 136 Mo. 537, 37 S. W. 506.

A city treasurer may be compelled by the writ to issue bonds, where a contract for municipal improvements provided for its payment by the issue of bonds, upon his refusal to do so: Sheehan v. Treasurer, 11 Misc. Rep. 487, 33 N. Y. Supp. 428.

e. Sheriffs and Constables.

1. **In General.**—A writ of mandate will issue to compel the execution of a writ of restitution by a sheriff: Fremont v. Crippen, 10 Cal. 212, 70 Am. Dec. 711; also a writ of execution issued under a judgment in a justice's court: North Pac. C. R. Co. v. Gardner, 79 Cal. 213, 21 Pac. 735; and it lies to compel a sale under a levy, though there be another remedy: Cummins v. Webb, 4 Ark. 229. Where a sheriff, from whose possession property seized under attachment has been taken by a claimant under a replevin bond, seizes the property under a second attachment against the same defendant, before plaintiff's right to possession is determined, mandamus lies to compel a return of possession to such claimant, an action of replevin or one against the sheriff for neglect of duty not being adequate: Coos Bay etc. Nav. Co. v. Wieder, 26 Or. 453, 38 Pac. 338.

In State v. Turner, 32 S. C. 348, 11 S. E. 99, the court refused the writ to compel a sheriff to pay over money wrongfully retained, saying: "The claim of the relator is an ordinary money demand for a specific and ascertained amount, and we see no reason why, under proper allegations and sufficient proofs, he could not by an ordinary action obtain the same relief which he is now seeking by mandamus, to wit, the payment of the money alleged to be in the hands of respondent belonging to the relator. It is true that in modern times the remedy by mandamus has been extended to cases in which it formerly could not have been applied, as may be seen by the case of State ex rel. Townsend v. McIver, 2 S. C. 25, and the cases therein cited, so that the remedy can now be obtained in some cases, even though the relator may also be able to maintain an action; but those are cases where the damages are unliquidated, or cases in which the rights or interests of the public are some way involved, or cases where the thing sought to be obtained has some peculiar or special value outside of its mere pecuniary or market value. This case, however, does not fall within any of these classes. The claim here is for a specific sum of money, due to a private individual, in which the public have no concern, and we do not see why a judgment for such sum of money would not answer all the ends attainable by mandamus." That mandamus is the proper remedy to compel a sheriff to execute a conveyance for property sold by him, see Duke v. Beeson, 79 Ind. 24.

2. **Setting Off Exemptions.**—Where the law provides that the officer holding an execution shall cause the property claimed as exempt to be appraised and set apart to the debtor, mandamus is the appropriate remedy to enforce this duty: Pudney v. Burkhart, 62 Ind. 179; People v. McClay, 2 Neb. 7; State v. Wilson, 31 Neb. 462, 48 N. W. 147. In the former of those cases the court said: "After levy made, perhaps the debtor might replevy the property if it was personal; in such case he would have an adequate remedy without the writ of mandate, but the debtor may demand the exemption before levy, and, should it be refused him, we know of no adequate remedy except by writ of mandate." In accordance with the general principle that the writ will not issue where it would be unavailing, it will be refused where it is sought to compel a sheriff to appraise personal property levied on, to enable the execution debtor to select such as he desires to claim as exempt, after the property has been sold and delivered by the officer: State v. Bowden, 18 Fla. 17. Nor will it lie to compel a sheriff to lay off to a wife the homestead of her husband in lands levied on an execution against him, though conveyed to her by her husband before judgment obtained, where land outside of the levy was assigned to him under the same judgment: State v. Nance, 42 S. C. 421, 20 S. E. 279.

f. **Land Officers.**—When one has complied with the law in applying to purchase state lands, he is entitled to his deed or patent; and when a void deed has been issued, and the original owner applies to the auditor general, tenders the full amount of taxes due, and demands a certificate of error, he is entitled to it, and mandamus will lie to compel the auditor general to issue it: Hubbard v. Auditor General, 120 Mich. 505, 79 N. W. 979. So it will lie to compel a commissioner of the general land office to reinstate relator as purchaser of certain public lands, the award to him having been canceled: Hazelwood v. Rogan, 95 Tex. 295, 67 S. W. 80; and to force an entry taker to receive entries where he wrongfully refuses: Rainey v. Aydelette, 51 Tenn. (4 Heisk.) 122. It will not lie, however, to compel the execution of a patent to a party, where a prior patent had been issued to another person, the state having thereby parted with her title, and the petitioner's remedy being a suit in equity to devest the title of the patentee: Smithee v. Mosely, 31 Ark. 425.

That the mere ministerial duty of delivering a patent to the person entitled thereto will be enforced by mandamus, see United States v. Schurz, 102 U. S. 378.

g. **Patent and Pension Officers.**—When the Commissioner of Patents has determined that certain persons are entitled to a patent, he acts ministerially in preparing the patent for the signature of the secretary, and in countersigning it, and if he fails or refuses to perform these acts mandamus is the proper remedy: Butterworth v. United States, 112 U. S. 50, 5 Sup. Ct. Rep. 25.

Where the Secretary of the Interior overrules a decision of the Commissioner of Pensions, refusing to grant to a certain individual a pension, mandamus will lie to compel him to act in accordance with the order of his superior: United States v. Black, 128 U. S. 40, 9 Sup. Ct. Rep. 12.

h. **Heads of Executive Departments.**—The question as to how far the heads of executive departments of the government may be controlled by mandamus has been before the supreme court of the United States on several occasions and has been thoroughly discussed by that body. In Marbury v. Madison, 5 U. S. (1 Cranch) 137, Chief Justice Marshall said: "Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." While these remarks were obiter, they are, nevertheless, entitled to great weight, and in United States v. Schurz, 102 U. S. 378, the court said: "Though it may be said that the opinion of Mr. Chief Justice Marshall in that case was not necessary to the decision made, which was that this court had no original jurisdiction in that case, the principles of the opinion have since been repeatedly recognized and acted upon in this court, and the case cited with approval in its definition of the circumstancs under which persons holding public offices will be compelled to perform certain duties which are merely ministerial: Kendall v. United States, 12 Pet. 524; Decatur v. Paulding, 14 Pet. 497; Kendall v. Stokes, 3 How. 87; Commissioner of Patents v. Whiteley, 4 Wall. 522." See, also, United States v. Black, 128 U. S. 40, 9 Sup. Ct. Rep. 12; United States v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197. Where judgment or discretion is required to be exercised by the officer, the general rule applies, and mandamus will not lie: Secretary of the Interior v. McGarrahan, 76 U. S. (9 Wall.) 298; New Orleans Nat. Bank v. Merchant, 18 Fed. 841.

In Galveston etc. Ry. Co. v. Gross, 47 Tex. 428, the court held, citing Bledsoe v. International R. R. Co., 40 Tex. 537, that the courts have no power to compel the chief officers of any of the executive departments of the government to perform an official duty. See, however, Kuechler v. Wright, 40 Tex. 600.

That mandamus will lie at the instance of the attorney general to compel the president of the senate of a state to assume the office of governor, when the same is vacant, see Attorney General v. Taggart, 66 N. H. 362, 29 Atl. 1027.

In State v. Deslonde, 27 La. Ann. 71, the court refused a writ of mandate to command the Secretary of State of Louisiana to promulgate as a law a certain act passed by the legislature. But in State v. Secretary of State, 43 La. Ann. 590, 9 South. 776, it was issued to compel that official to publish proposed constitutional amendments, such being his duty by law.

How far mandamus will lie against the governor of a state is discussed in the note to Greenwood etc. Land Co. v. Routt, 31 Am. St. Rep. 294, and will therefore be omitted here.

i. Compelling Officials to Attend Meetings.—Mandamus will not lie to compel aldermen to attend meetings of the common council, and to perform their general official duties regularly. "A mandamus would be entirely inefficient in reaching the mischief complained of, as no court by such means could keep up a continuous or repeated attendance. Courts are not created to conduct the municipal affairs of cities, and nothing short of any such general supervision would reach such cases as the present. The remedy, if there is one, is not judicial. This is not a case where there is some specific right involved, but is a general violation of public duty": People v. Whipple, 41 Mich. 548, 49 N. W. 922. Nor will this writ be granted to compel the clerk of a village to attend meetings of the village council: Cady v. Ihnken, 129 Mich. 466, 89 N. W. 72.

j. Examination of Public Records.—It may be stated as a general rule that mandamus is the proper remedy to compel permission to examine and inspect public records and documents: State v. King, 154 Ind. 621, 57 N. E. 535; Hawes v. White, 66 Me. 305; Brown v. County Treasurer, 54 Mich. 132, 52 Am. Rep. 800, 19 N. W. 778; State v. Hobart, 12 Nev. 408. It will not issue, however, to compel the clerk of the court to permit an abstracter of titles to examine and copy a file in an action relating to land between private parties, where the petition negatives constructive notice of the pendency of the action, and does not assert actual notice, nor state that the examination and copying are necessary to the interests of his employer: Burton v. Reynolds, 110 Mich. 354, 68 N. W. 217.

k. Award and Performance of Public Contracts.—As mandamus does not lie to control discretion, the writ cannot be made use of to compel the awarding of a contract, where the board or officer is to award it to the lowest "responsible" bidder: State v. Rickards, 16 Mont. 145, 50 Am. St. Rep. 476, 40 Pac. 210; and see note on this subject to that case in 50 Am. St. Rep. 489.

The writ will not issue where, a contract having been regularly entered into, specific performance is thereby sought against a municipality or state, it being an ordinary business contract: State v. Mortensen (Neb.), 95 N. W. 831; and the remedy, if any exists, is an action for the breach thereof: People v. Aldridge, 83 Hun, 279, 31 N. Y. Supp. 920. And see Portman v. State Fish Commrs., 50 Mich. 258, 15 N. W. 106.

To compel a mayor to sign a contract which it is his duty to sign, the writ will lie: Nicholson Pavement Co. v. City of Newark, 35 N. J. L. 396.

l. **Laying Out and Repairing Streets, Roads and Bridges.**—Where the common council of a city take all the necessary steps for opening a street, and appoint commissioners to assess the damages to be awarded the owners of the lands to be taken for that purpose, after the award has been made and confirmed, they have no authority to discontinue the proceedings; and if they do, mandamus will lie to compel them to proceed and open the street: People v. Common Council, 20 How. Pr. 491. And it is the appropriate remedy to compel the assessment of damages done by reason of the change in the grade of a street: People v. Board of Assessors, 53 How. Pr. 280; and for the removal of obstructions in the streets, by the officials intrusted with the care of the same: People v. City of New York, 59 How. Pr. 277. Where a lot outside a district of assessment is by mistake included therein, it is to be regarded as a clerical error, to be rectified according to the city charter by the board of assessors, and mandamus is the proper remedy to compel the performance of this duty: People v. Wilson, 119 N. Y. 515, 23 N. E. 1064.

The writ will lie to compel drainage commissioners to repair and modify a drainage system so that an ample outlet shall be provided into which the lands of the district may be drained: Peotone etc. Drainage Dist. v. Adams, 61 Ill. App. 435.

Where it is the duty of a board or municipality to keep in repair a bridge, the performance thereof will be compelled by mandamus: City of Ottawa v. People, 48 Ill. 233; State v. Board of Commrs., 39 Kan. 700, 18 Pac. 952; Inhabitants of Brunswick v. City of Bath, 90 Me. 479, 38 Atl. 532; Bigelow v. Brooks, 119 Mich. 208, 77 N. W. 810.

m. **Issuance and Revocation of Licenses and Certificates.**

1. **For Professions and Occupations.**—The question of the propriety of mandamus as a remedy for enforcing the granting of a license to carry on a trade, profession or business has been before the court on several occasions. If certain requirements are specified by law for procuring a license, and these have been complied with, the officer in whom authority is lodged may, upon refusal to issue it, be compelled by mandamus to do so, there being no discretion in the matter: State Board v. White, 84 Ky. 626, 2 S. W. 225; St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045. So it will lie where one entitled to be examined for admission to practice law has been refused an examination: State v. Baker, 25 Fla. 598, 6 South. 445.

Where a state board may grant certificates to practice a profession upon presentation of a diploma from a "reputable" college, or one "in good standing," it naturally involves the use of judgment or discretion in determining whether the particular college in each case falls within that term, and a writ of mandate will not lie to control

it: State v. Gregory, 83 Mo. 123, 53 Am. Rep. 565; Williams v. Dental Examiners, 93 Tenn. 619, 27 S. W. 1019. In such cases the board has no discretion as to any other matter than the character of the college issuing the diploma, and when they have decided that such college is reputable, their discretion is exhausted, and the issuance of the license becomes a mere ministerial duty, enforceable by mandamus: Illinois State Board v. People, 123 Ill. 227, 13 N. E. 201, affirming 20 Ill. App. 457.

If an adequate remedy by appeal to a court is provided, mandamus will not lie to compel the issuance of a certificate, in accordance with the general rule: State v. Board of Medical Examiners, 10 Mont. 162, 25 Pac. 440; State v. Hitt, 13 Wash. 547, 43 Pac. 638. Nor will it issue to review the decision of a city council in revoking a liquor license, where it did not exceed its jurisdiction, although such order may be clearly erroneous: Miles v. State, 53 Neb. 305, 73 N. W. 678.

It is the proper remedy to compel a city treasurer to accept an amount tendered in payment of a license tax, and to issue a receipt, and a city clerk to issue a license upon the presentation of that receipt: Metropolitan etc. Ins. Co. v. Darenkamp, 23 Ky. Law Rep. 2249, 66 S. W. 1125. See, also, City of East St. Louis v. Wider, 46 Ill. 351.

2. **For Carrying on Insurance.**—Statutes are frequent in the several states by which it is provided that before an insurance company can do business within the state, it must obtain a certificate or license from the insurance commissioner. Whether mandamus will lie to compel such officer to issue a license depends upon whether he is to be considered as a judicial or as a ministerial officer. Several courts, construing the statutes of their state upon the subject, have decided that he fails within the former class, and cannot be coerced by the writ of mandate: American etc. Ins. Co. v. Tyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; Dwelling-house Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265; State v. Carey, 2 N. Dak. 36, 49 N. W. 164; State v. Moore, 42 Ohio St. 103. In Dwelling-house Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265, the court said: "One of the principal objects of the act creating the insurance department and the office of superintendent, is the protection of the insured by excluding from the state such companies as are unsound and irresponsible. To accomplish this, large powers and considerable discretion must necessarily be lodged with some one. The legislature has placed the execution of the insurance law and the conduct of the department in the control of the superintendent. From the provisions referred to, it will be seen that he is to determine the character and responsibility of an applying company, or of one already admitted, if there is reason to suspect that it is in an unsound condition. To do this, rigid examinations are authorized, and other safeguards provided. The legislature has prescribed the standards by which an insurance company is to be admitted, or allowed to con-

tinue business after admission; but whether the companies come up to those standards or requirements is to be determined by the superintendent. He is intrusted with the exclusive control of the department. It is he who values their assets and investigates their condition. He examines the evidence of fair dealing or fraud on their part; and it is he alone who must be satisfied before a license is granted. On evidence satisfactory to him, a license may be revoked; and, indeed, every one of these steps in granting, refusing, or revoking the authority of insurers, involves the exercise of discretion and judgment, which is vested in the superintendent alone."

Other authorities, however, consider the power of the insurance commissioner to grant or revoke licenses merely ministerial: Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474; State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692. Where a company has complied with all the requirements of the law, mandamus is the proper remedy to compel the issuance of a license refused through an erroneous interpretation of the law by the commissioner: Bankers' etc. Ins. Co. v. Howland, 73 Vt. 1, 48 Atl. 435. See, also, People v. Van Cleave, 183 Ill. 330, 55 N. E. 698.

That injunction, and not mandamus, is the proper remedy to prevent the revocation of a license by an insurance commissioner, see State v. Hahn, 50 Ohio St. 714, 35 N. E. 1052.

n. Management of Schools.

1. **In General.**—Where a party aggrieved by the action of a board of school directors has an adequate remedy by appeal to the county superintendent, and from him to the state superintendent, he must avail himself thereof, and mandamus will not lie: Marshall v. Sloan, 35 Iowa, 445. But it will issue where the board refuses or neglects to act: Case v. Blood, 71 Iowa, 632, 33 N. W. 144. Accordingly, the writ has been awarded to compel them to provide school facilities: Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540; to establish or erect schoolhouses: State v. Custer, 11 Ind. 210; Benjamin v. Malaka Dist. Tp., 50 Iowa, 648; to compel the adoption of text-books: State v. School Directors, 74 Mo. 21; State v. Board of Education, 35 Ohio St. 368; to require a board of education to draw its draft upon the school fund to pay for supplies furnished the schools under its care, in pursuance of its contracts therefor: Raisch v. Board of Education, 81 Cal. 542, 22 Pac. 890; and to compel them to hold an election for members of the board: State v. School Board, 131 Mo. 505, 33 S. W. 3.

2. **Admission of Children to Public Schools.**—Where negro children of school age are excluded from the privilege of attending school, mandamus is the proper remedy to compel their admission: State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713. It will not lie, however, to compel the admission of a colored child to a school for white children alone, where a school for negroes equal in advantages to the other is provided: People v. Easton, 13 Abb. Pr., N. S., 159.

The writ will not issue to have children admitted to schools where they are full: In re Nicoll, 44 Hun, 340.

3. **Reinstatement of Pupil Wrongfully Suspended.**—Mandamus is the proper remedy to compel the reinstatement of a pupil wrongfully expelled from school: Perkins v. Directors of School Dist., 56 Iowa, 476, 9 N. W. 356; In re Rebenack, 62 Mo. App. 8; Jackson v. State, 57 Neb. 183, 77 N. W. 662.

4. **Recognition of Teacher Illegally Removed.**—The writ lies to compel the recognition of a teacher and to permit her to perform her duties, and is the appropriate remedy to restore a teacher in a public school to a right given by express law, from which she is unlawfully precluded: Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; People v. Van Siclen, 43 Hun, 537; Morley v. Power, 73 Tenn. (5 Lea) 691; and to compel such board to issue a warrant on the proper disbursing officer for installments of salary: Morley v. Power, 73 Tenn. (5 Lea) 691.

5. **Auditing and Allowing Claims.**—Where the duty of auditing claims regularly presented is enjoined by law upon an officer or board, mandamus will lie to compel the carrying out of this duty: Fowler v. Peirce, 2 Cal. 165; Illinois State Hospital v. Higgins, 15 Ill. 185; State v. Warren County Commrs., 136 Ind. 207, 35 N. E. 1100; People v. Westford, 53 Barb. 555; People v. Coler, 48 App. Div. 492, 62 N. Y. Supp. 964; State v. Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; Lower v. United States, 91 U. S. 536. See, also, Safford v. Board of Health, 110 Mich. 81, 64 Am. St. Rep. 332, 67 N. W. 1094.

If an appeal may be taken where a claim has been disallowed, the writ will not issue: State v. Babcock, 22 Neb. 38, 33 N. W. 711. Nor will it lie to interfere with the discretion of the auditor in examining and adjusting claims: Sawyer v. Mayhew, 10 S. Dak. 18, 71 N. W. 141, where it is said: "Although, upon a refusal to act, the auditor may be required to proceed within the exercise of his discretion, it is only when the law has specially enjoined upon such officer a ministerial duty that mandamus will lie to compel its performance in a particular manner. . . . . The following cases sustain the doctrine that mandamus is not a remedy by which to review or interfere with the discretionary action of an officer to whom the people have intrusted the responsibility of auditing claims against the state: People v. Auditor General, 38 Mich. 746; Danley v. Whiteley, 14 Ark. 687; State v. Doyle, 38 Wis. 92; State v. Board of Commrs., 119 Ind. 444, 21 N. E. 1097. When, as in this case, an officer has, in the exercise of his discretion, examined and disallowed a claim, mandamus will not issue to reverse his judgment and compel him to act in a specific manner diametrically opposite: Tilden v. Board of Supervisors, 41 Cal. 68; People v. Common Council of Troy, 78 N. Y. 33, 34 Am. Rep. 500; State v. Carey, 2 N. Dak. 36, 49 N. W. 164; Hoole v. Kinkead, 16 Nev. 217; State v. Lafayette County Court,

41 Mo. 224." See, also, Payne v. State Board, 4 Idaho, 384, 39 Pac. 548; Auditorial Board v. Hendrick, 20 Tex. 60.

p. **Drawing Warrants.**—Where the amount of a claim has been regularly ascertained or allowed by the proper body, mandamus is the proper remedy to compel an auditor to draw his warrant for the amount thereof: Reynolds v. Taylor, 43 Ala. 420; State v. Brewer, 62 Ala. 215; State v. Gamble, 13 Fla. 9; Bryan v. Cattell, 15 Iowa, 538; People v. Secretary of State, 58 Ill. 90; Rice v. State, 95 Ind. 33; State v. Mount, 21 La. Ann. 352; People v. Martin, 58 Barb. 286; White v. Ayer, 126 N. C. 570, 36 S. E. 132; State v. County Auditor, 43 Ohio St. 311, 1 N. E. 209; Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034; State v. Richards, 15 Utah, 477, 49 Pac. 532; Abernethy v. Town of Medical Lake, 9 Wash. 112, 37 Pac. 306. The issuance of the warrant, regularly ordered by the commissioners' court, will not be defeated on the ground that there is an adequate remedy at law by suit against the county, where it is provided as a condition precedent to such suit that the claim be presented to the commissioner's court for allowance and rejected by them: Callaghan v. Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837.

Where the issuance of the warrant depends upon the exercise of judgment by the officer, and he decides that the claim is unjust and exorbitant, mandamus will not lie to control that discretion: Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245.

That mandamus will lie to compel the officer to countersign a warrant to which the relator is entitled, see Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; People v. Havemeyer, 3 Hun, 97. But see People v. Wood, 35 Barb. 653.

q. **Payment of Claims.**

1. **Where Liquidated and Ascertained.**—Where a disbursing officer refuses to pay a claim presented to him, which has been ascertained in amount and which it is his duty to discharge, mandamus is the appropriate remedy: Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635; Brown v. Crego, 32 Iowa, 498; Board of School Commrs. v. Gantt, 73 Md. 521, 21 Atl. 548; Dayton Tp. v. Rounds, 27 Mich. 82; McKillop v. Supervisors, 116 Mich. 614, 74 N. W. 1050; Clark v. Earle, 42 N. J. L. 94; People v. Edmunds, 19 Barb. 468, 9 How. Pr. 470; People v. Abbott, 45 Hun, 293, 13 Civ. Proc. Rep. 101; People v. Anderson, 69 App. Div. 619, 75 N. Y. Supp. 240; Portland Stoneware Co. v. Taylor, 17 R. I. 33, 19 Atl. 1086; Cloud v. Town of Sumas, 9 Wash. 399, 37 Pac. 305; State v. County Court, 37 W. Va. 808, 17 S. E. 379. See, also, Taylor v. County Court, 2 Utah, 405. In State v. Staub, 61 Conn. 553, 23 Atl. 924, the court said: "When a claim is liquidated in the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in respect to it. When the law fixes definitely the amount of any claim, and also fixes the time and manner of its payment and the person to

whom it is due, and the claim is presented to the comptroller by that person and at that time, he has in respect to it 'no discretion to exercise, no judgment to use, and no duty to perform,' but to draw his order in payment of it." It will also lie to compel the application of funds by a city treasurer to warrants in the order of their registration: First Nat. Bank v. Arthur, 10 Colo. App. 283, 50 Pac. 738.

The writ will issue to compel a state auditor to issue a warrant on the state treasurer for the payment of a valid claim recognized by law to meet which an appropriation was made by legislation: State v. Steele, 37 La. Ann. 353. See, also, Hommerich v. Hunter, 14 La. Ann. 225. And where a county warrant has been drawn on a special fund, and there is money belonging to it in the hands of the treasurer, mandamus will lie to compel its payment: Beeney v. Irwin, 6 Colo. App. 66, 39 Pac. 900.

2. **Where Unliquidated.**—Where there is a claim against a city or county, unliquidated or unascertained, mandamus is not the proper remedy; it should first be reduced to judgment: Cox v. County Commrs., 65 Ga. 741; Garrard County Court v. McKee, 74 Ky. (11 Bush) 234; State v. Clay County, 46 Mo. 231; Mansfield v. Fuller, 50 Mo. 338; State v. Hamilton County Commrs., 26 Ohio St. 364; but see McArthur v. Duncan Township, 34 Mich. 27.

In Little v. Township Committee, 37 N. J. L. 84, the court quoted with approval from Dillon on Municipal Corporations, volume 2, section 686, where, speaking of mandamus, that author said: "We have seen that it is a general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the more ordinary processes of the law, and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced and rendered effectual by ordinary execution, that mandamus will not lie to compel payment in advance of judgment obtained, and this view is the one most consistent with principle, when the matter stands wholly unaffected by legislation."

3. **Existence of Other Adequate Remedies.**—The writ will not lie to enforce a claim against a county, rejected by the supervisors, where a statute authorizes a suit against the county, thus affording a plain, speedy and adequate remedy at law: Crandall v. Amador County, 20 Cal. 72; and it has been denied where relief might be obtained by motion or suit on the treasurer's bond: Arrington v. Van Houton, 44 Ala. 284; State v. Bridgman, 8 Kan. 458.

That the writ will not issue where there is no money in the officer's hands, see State v. Dubuclet, 26 La. Ann. 127.

4. **Where Doubtful and Disputed.**—Where the claim is disputed and a well-founded doubt arises, either as to the right of the appli-

cant to receive the fund or the duty of the officer to pay it out, mandamus is not the proper remedy: People v. Johnson, 100 Ill. 537, 39 Am. Rep. 63; Simmons v. Davis, 18 R. I. 46, 25 Atl. 691; Foster v. Angell, 19 R. I. 285, 33 Atl. 406. See, however, Bacon v. City of Tacoma, 19 Wash. 674, 54 Pac. 609, to the effect that the writ is a proper remedy, even though the liability of the city is disputed on the ground that the warrants have been once paid or are forgeries, a statute of that state permitting the trial of disputed questions of fact in mandamus proceedings. In Carolina Grocery Co. v. Burnet, 61 S. C. 205, 39 S. E. 381, it was held that mandamus was the proper proceeding to compel a county treasurer to pay a county warrant which he refused to pay on the ground that the board which had issued it was illegally constituted.

In Smyth v. Titcomb, 31 Me. 272, the court made use of the following language: "A public officer intrusted with the collection and disbursement of revenue, in any of the departments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He cannot refuse to act because others may question his right. The individuals to be affected may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs, or may choose to contest the validity of the enactment personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such officers. The state, counties, towns, and school districts must be supplied, in order to accomplish the purposes of their organizations, and the proper officers, in their respective departments, must seasonably furnish the authorized amounts.

"The consequences would be ruinous if they could withhold their services, and the necessary means, either from timidity or captiousness, until all questions of law, which might arise in the performance of their official duties, should first be judicially settled."

5. **Payment of Official Salaries and Fees.**—There is a conflict as to whether mandamus will lie to enforce the payment of an official salary by a municipal corporation. Some decisions hold that it will: McBride v. Grand Rapids, 47 Mich. 236, 10 N. W. 353; Speed v. Common Council, 100 Mich. 92, 58 N. W. 638; while others hold that it is not the proper remedy, it being a mere debt and enforceable as such in an ordinary proceeding at law: State v. Mayor of Kansas City, 38 Kan. 593, 17 Pac. 185; People v. Board of Education, 60 Hun, 486, 584, 15 N. Y. Supp. 308.

If the allowance of fees of an officer is discretionary with the board, mandamus will not lie to enforce payment: Kane County Supervisors v. Pierce, 60 Ill. 481; but where they are fixed or allowed

by law, it will issue and payment be thereby compelled: City of Chicago v. O'Hara, 60 Ill. 413; Baker v. Johnson, 41 Me. 15.

r. **Levying Tax to Meet Obligations.**—There is no doubt that mandamus is the proper remedy to compel the levying and collection of a tax, with which to pay off claims against a city or county, fixed in amount. In Shackelton v. Town of Guttenberg, 39 N. J. L. 660, it is said: "That mandamus is generally the proper remedy to enforce the levy of taxes for the payment of judgments against municipal corporations, where the ordinary process of execution is inadequate, seems both to follow from the reason of the thing, and to be settled by many adjudications. Usually, the money required to satisfy such judgments must be the proceeds of taxation. The duty to pay is clearly and conclusively established by the judgments, and execution failing, all ordinary legal remedy is exhausted, so that the conditions which justify a resort to mandamus exist, viz., a clear legal right, requiring the performance of a specific duty, and no other adequate means of redress." In another case the same court said: "In Emeric v. Gilman, 10 Cal. 404, 70 Am. Dec. 742, Justice Field says: 'Whoever becomes a creditor of a county must look to its revenues alone for payment. The statute authorizes a suit against the county by which the demand may pass into judgment, but it has given no remedy by execution, and when the judgment is rendered the plaintiff must resort to mandamus.'

"Mr. Freeman, in his work on Executions, section 22, takes the same view: 'A judgment against a county or municipal corporation is ordinarily no more than the mere establishment of a valid claim, for which it is the duty of the proper officers to provide means of payment out of the revenues of the defendant. It is error to award or issue execution on such judgment' ": Lyon v. City of Elizabeth, 43 N. J. L. 158.

In the following cases it has been held that mandamus was the appropriate remedy to call into action the taxing power in order to satisfy valid demands: Tarver v. Commrs. Court, 17 Ala. 527; Miller v. McWilliams, 50 Ala. 427, 20 Am. Rep. 297; Knox Commrs. v. Montgomery, 106 Ind. 517, 6 N. E. 915; Palmer v. Stacy, 44 Iowa, 340; Stevens v. Miller, 3 Kan. App. 192, 43 Pac. 439; State v. New Orleans, 37 La. Ann. 13; Board of Police v. Grant, 17 Miss. (9 Smedes & M.) 77, 47 Am. Dec. 102; Klein v. Smith County Supervisors, 54 Miss. 254; State v. County Commrs., 6 Neb. 454; Boyce v. Cayuga County Supervisors, 20 Barb. 294; Chase v. Saratoga County, 33 Barb. 603; Gooch v. Gregory, 65 N. C. 142; Leach v. Fayetteville Commrs., 84 N. C. 829; State v. Harris, 17 Ohio St. 608; Cumberland County Supervisors v. Randolph, 89 Va. 614, 16 S. E. 722; State Sav. Bank v. Davis, 22 Wash. 406, 61 Pac. 43; State v. City of Milwaukee, 25 Wis. 122; In re Sopenhaver, 54 Fed. 660. See, also, Minhinniah v. Haines, 29 N. J. L. 388; Morton v. Comptroller General, 4 S. C. 430;

Aylesworth v. Gratiot County, 48 Fed. 350. It is not the proper remedy to compel a board to levy a tax to pay a debt not ascertained and not acknowledged: King v. Trustees, 17 Ky. Law Rep. 803, 33 S. W. 752.

Where a statute requiring the levy and collection of a tax is void, the officer who would be charged with the duty if it were valid may refuse to act, and mandamus will not lie to compel him: State v. Tappan, 29 Wis. 664, 9 Am. Rep. 622.

Where by law it was enacted that a certain assessment which had been levied and paid by property owners be refunded by a municipal corporation, and the municipality refused to include in the amount to be raised by taxation the sum so directed to be refunded, it was held that mandamus was the proper remedy by such property owners to compel its insertion into the estimate and apportionment: People v. Molloy, 35 App. Div. 136, 54 N. Y. Supp. 1084, affirmed 55 N. E. 1099. But in City of Sherman v. Langham (Tex. Sup.), 40 S. W. 140, the court held that the writ would not issue to compel in advance the levy of a sufficient portion of the regular tax to pay off a judgment against the city.

s. **Issuance of Bonds and Payment of Interest Thereon.**—The appropriate remedy to compel the issuance by a county of its bonds in payment of a subscription to the capital stock of a corporation is mandamus: Atchison etc. R. Co. v. Jefferson County Commrs., 12 Kan. 127; as it also is to compel an officer of a municipal corporation to execute and deliver bonds of the corporation, in payment of the price of lands purchased by it: People v. Brennan, 39 Barb. 522. See, also, People v. Common Council, 45 Barb. 473, 1 Abb. Pr., N. S., 318; Cincinnati etc. R. Co. v. Clinton County Commrs., 1 Ohio St. 77; Noble County Commrs. v. Hunt, 33 Ohio St. 169.

To satisfy the interest on bonds, mandamus will lie to cause the levy and collection of a tax: Columbia County Commrs. v. King, 13 Fla. 451; Commonwealth v. Allegheny County Commrs., 32 Pa. St. 218; Commonwealth v. Pittsburgh, 34 Pa. St. 496; Commonwealth v. Allegheny County Commrs., 37 Pa. St. 277.

t. Trying Title to Public Office by Mandamus.

1. **Generally not Lie.**—It has often been attempted to make use of the writ of mandate to try title to a public office, but the overwhelming weight of authority has firmly established the rule that it is not the proper remedy where it is already filled by an actual incumbent, exercising the functions of the office de facto and under color of right, but that quo warranto or information in the nature of quo warranto should be brought. "The inefficacy of mandamus as a method of trying title to office," said the court in In re Torney, 7 Misc. Rep. 260, 27 N. Y. Supp. 913, 23 Civ. Proc. Rep. 333, "inheres in the nature of the writ itself, which issues only when the right is clear, and when no other legal redress is available, and which, involving only a contention between relator and respondent, is incap-

able of concluding the claim of a stranger." To the same effect see the following: Ex parte Harris, 52 Ala. 87, 23 Am. Rep. 559; Territory v. Supervisors, 2 Ariz. 248, 12 Pac. 730; Fitch v. McDiarmid, 26 Ark. 482; Underwood v. White, 27 Ark. 382; People v. Olds, 3 Cal. 167, 58 Am. Dec. 398; Kelly v. Edwards, 69 Cal. 460, 11 Pac. 1; Duane v. McDonald, 41 Conn. 517; Harrison v. Simonds, 44 Conn. 318; Bonner v. State, 7 Ga. 473; People v. Forquer, 1 Ill. 104; People v. Matteson, 17 Ill. 167; Hussey v. Hamilton, 5 Kan. 462; State v. Johnson, 29 La. Ann. 399; French v. Cowan, 79 Me. 426, 10 Atl. 335; People v. Common Council, 18 Mich. 338; Frey v. Michie, 68 Mich. 323, 36 S. W. 184; State v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; State v. Churchill, 15 Minn. 455; St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; State v. Thompson, 36 Mo. 70; State v. John, 81 Mo. 13; State v. Smith, 49 Neb. 755, 69 N. W. 114; Maverick Oil Co. v. Hanson, 67 N. H. 203, 29 Atl. 461; State v. Steen, 43 N. J. L. 542; Fort v. Howell, 58 N. J. L. 541, 34 Atl. 751; Casey v. Chase, 64 N. J. L. 207, 44 Atl. 872; In re Gardner, 68 N. Y. 467; People v. Goetting, 133 N. Y. 569, 30 N. E. 968, affirming 55 Hun, 611, 8 N. Y. Supp. 742; People v. Ogden, 41 Misc. Rep. 246, 84 N. Y. Supp. 73; Swain v. McRae, 80 N. C. 111; State v. Callahan, 4 N. Dak. 481, 61 N. W. 1025; Biggs v. McBride, 17 Or. 640, 21 Pac. 878; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

2. **Cases in Which It has been Allowed.**—In a few instances, the writ has issued to try title to office: Harwood v. Marshall, 9 Md. 83; Keough v. Aldermen, 156 Mass. 403, 31 N. E. 387; Lawrence v. Hanley, 84 Mich. 399, 47 N. W. 753, in which case the court, speaking of settling the right to a public office, said: "This is not usual in mandamus proceedings, quo warranto being in most cases the appropriate proceeding to test the right to hold an office; but the exigencies of the case, as we view it, and the public interest, demand that the question shall be speedily determined, which cannot be done by quo warranto. And when a person in office de jure et de facto is interfered with, by one whose lack of title is plain and governed by adjudicated cases in our own courts, it is not only proper, but best, to settle the question by mandamus."

To bar the right to mandamus, the other remedy need not be quo warranto, but if an election contest will furnish the desired relief, the writ will not be granted: People v. Cover, 50 Ill. 100; State v. Smith, 104 Mo. 661, 16 S. W. 503, affirming 15 S. W. 614.

The rule does not apply to clerks and subordinates unlawfully removed, but only to the public officers created by law: People v. Sutton, 88 Hun, 173, 34 N. Y. Supp. 487.

3. **Delivery of Books, Records and Insignia of Office.**—While not available to try title, mandamus is the appropriate remedy to compel the delivery of the appurtenances of an office, such as records, books, seals, and insignia, by an incumbent to the person prima facia entitled thereto: Territory v. Shearer, 2 Dak. 332, 8 N. W. 135; State v. Johnson, 30 Fla. 433, 11 South. 843; People v. Kilduff, 15 Ill. 492,

60 Am. Dec. 769; People v. Head, 25 Ill. 325; Crowell v. Lambert, 10 Minn. 369; State v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Cruse v. State, 52 Neb. 831, 73 N. W. 212; Kimball v. Lamprey, 19 N. H. 215; Warner v. Myers, 4 Or. 72; Commonwealth v. Lyter, 162 Pa. St. 50, 29 Atl. 352; Driscoll v. Jones, 1 S. Dak. 8, 44 N. W. 726; State v. Oates, 86 Wis. 634, 39 Am. St. Rep. 912, 57 N. W. 296. See, also, State v. Kersten (Wis.), 95 N. W. 120. Where the title is uncontested or has been adjudicated, the writ will issue to compel the delivery of books and papers belonging to the office: State v. May, 106 Mo. 488, 17 S. W. 660; and see People v. Dikeman, 4 How. Pr. 124.

If the title to the office is directly and unavoidably in controversy, although the action is in form an action, not for the determination of the title, but for the recovery of possession of the records and other property of the office, mandamus will not lie: State v. Williams, 25 Minn. 340.

For the wrongful detention of books or papers by an officer, mandamus, and not replevin, is the proper remedy, for if the latter alone were allowed, if the books could not be produced a mere judgment for their value would be all that could be obtained: City of Keokuk v. Merriam, 44 Iowa, 432; and a further objection for obtaining possession of papers filed in a public office is urged in People v. State Treasurer, 24 Mich. 468, where it was said: "The remedy would not only involve a needless legal contention, but it is not a proper or lawful thing to allow a sheriff on such a writ to intermeddle with public papers. The policy of the law requires them to be guarded by their official custodian, and it would be a monstrous abuse if the state officers could be exposed to the visitation of ministerial officers who might be commanded by a writ, issued without the previous order or supervision of a court, to seize upon and deliver over to anyone who should sue out the process, any document or muniment to be found there. Such a claim would be preposterous. A mandamus is the only admissible writ to command public officers to produce and give up papers in their custody." See, also, Inhabitants of First Parish Sudbury v. Stearns, 38 Mass. (21 Pick.) 148.

u. Matters Dealing with Elections.

1. **Issuing Certificate of Election.**—The duty of issuing a certificate of election to the person entitled thereto will be enforced by writ of mandate: State v. Circuit Judge, 9 Ala. 338; Pacheco v. Beck, 52 Cal. 3; Burke v. Supervisors, 4 W. Va. 371. So where the petitioner was elected to an office, but the board of examiners refused to give him a certificate of election, and ordered a new election, at which another person was elected, mandamus was granted to compel the issuance of the certificate: In re Strong, 37 Mass. (20 Pick.) 484.

Nor is the rule different when applied to the office of member of a state legislature or of Congress, which bodies are the judges of the election and eligibility of its own members. In re O'Ferrall v. Colby, 2 Minn. 180, this was urged as a defense, the contention being that

no other tribunal could or ought to take jurisdiction of a case to enforce the issuing of a certificate of election thereto. The court met the objection in the following words: "This position, we think, is sufficiently answered by the fact that this is not a proceeding to try the right of any party to the office of senator, but simply to determine whether the plaintiffs are entitled, at the hands of the defendant, to certificates of election to that office. Nor can our decision in the least affect the question of the election of either of the candidates. That question can be definitely settled by the Senate alone. The aid of this court is sought to prevent the consequences of a usurpation of authority on the part of this board of canvassers, and to compel the defendant to do his duty. All that we can do is to arm the parties entitled with the credentials necessary to enable them properly to assert their rights before the proper tribunal. Whether they, or either of them, were legally elected is not a question here. One candidate may be entitled to a certificate of election, while his opponent may have a clear right to the office." Or, as was said in another case: "Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application has no reference whatever to the point of qualifications. Its sole purpose is to procure the requisite evidence, to present to that body, of a prima facie right to a seat in it, independent wholly of the question of qualification": People v. Hilliard, 29 Ill. 413.

The shifting of the burden of proof in favor of the relator, by the issuance of a certificate of election was not, however, considered enough to warrant the granting of the writ in Sherburne v. Horn, 45 Mich. 160, 7 N. W. 730, where a certificate had been issued to another person.

2. **Admission to Office and Recognizing Official Status.**—If a party is refused admission to a public office, and his right thereto is clear and he has no other specific legal remedy, mandamus will lie: Kelly v. City of Paterson, 35 N. J. L. 196; Fort v. Howell, 58 N. J. L. 541, 34 Atl. 751; Terrell v. Greene, 88 Tex. 539, 31 S. W. 631. In case of a disputed election to a municipal office, it was held that the writ would issue to compel recognition of a de facto officer till quo warranto had determined the rights of the parties: In re Delgado, 140 U. S. 586, 11 Sup. Ct. Rep. 874. And it will also lie to compel a board to recognize another officer as a member thereof, where a charter provided that he should be a representative upon that board, and be entitled to the same rights, privileges and powers as any other member: Smith v. Supervisors, 56 Mich. 217, 22 N. W. 267.

3. **Reinstating Officer Illegally Removed.**—For restoring a public officer illegally discharged or suspended, mandamus is the proper remedy: Metsker v. Neally, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206; State v. Police Commrs., 80 Mo. App. 206; Felts v. City of Memphis, 39 Tenn. (2 Head) 650; Nelson v. Edwards, 55 Tex. 389; Terrell v. Greene, 88 Tex. 539, 31 S. W. 631; Lewis v. Whittle, 77 Va.

415; State v. Common Council, 9 Wis. 254; but when the legality of the removal is a disputed question, depending upon the construction of statutory provisions, it was held in Kimball v. Olmstead, 20 Wash. 629, 56 Pac. 377, that mandamus was not the proper remedy.

It also lies to restore clerks and subordinates, unlawfully removed from their positions: People v. Sutton, 88 Hun, 173, 34 N. Y. Supp. 487. So where an employé was discharged in violation of civil service rules, mandamus was the proper remedy to reinstate him: Thompson v. Troup, 74 Conn. 121, 49 Atl. 907.

4. **Not Lie to Restrain Person from Qualifying or from Disturbing an Officer.**—Mandamus will not lie to restrain a party claiming to be a public officer from exercising his office, or to enjoin one, claiming to have been appointed or elected to an office from qualifying: People v. Ferris, 76 N. Y. 326. Nor will it issue to prevent a person from being disturbed or molested in the exercise of the functions and powers pertaining to his office, this being merely an attempt to substitute the writ for an injunction: Legg v. City of Annapolis, 42 Md. 203.

5. **Filing Ticket of Political Party and Entering Nominee's Name Thereon.**—The writ of mandate is the proper proceeding to compel the officer charged with that duty to file and certify a ticket of a political party, entitled to filing and certification by him: Williams v. Lewis, 6 Idaho, 184, 54 Pac. 619; and also to enter the names of nominees of a particular party as candidates: Rose v. Bennett, 25 R. I. 405, 56 Atl. 185. In that case two nominations for the same office were presented to the Secretary of State, each purporting to be a certificate of nomination by the Democratic party. The court said: "The point is taken that mandamus will not lie against the Secretary of State, because he must be the one to judge which is the proper certificate to be recognized. The statute does not provide for any hearing or examination of evidence on such a question by the Secretary of State, beyond a mere inspection of the papers. We therefore think that we must regard his duties in this respect as ministerial. He has no means of determining whether one is fraudulent or irregular, and therefore he can exercise no judicial discretion upon such a question."

6. **Powers and Duties of Canvassing Boards.**—In Ex parte Mackey, 15 S. C. 322, the court quoted with approval from McCrary on Elections, 106, 107, where it is said: "That the doctrine that canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial powers, is settled in nearly or quite all the states. . . . . There are statutes in some of the states which expressly confer upon a board of canvassing officers the power to revise the returns of an election, to take proof, and in their discretion to reject such votes as they deem illegal. Such a statute exists in Texas, and in Alabama, and in Louisiana and Florida." See, also,

People v. County Commrs., 6 Colo. 202, as to such officers having no judicial power.

In State v. Deane, 23 Fla. 121, 11 Am. St. Rep. 343, 1 South. 698, it was held that where such officers were called upon to exercise their discretion in determining whether a ballot was "scratched," and they decided that it was, mandamus would not lie to control that discretion.

If the canvassing board improperly performed its duty, mandamus lies; but not if it did so properly, according to the returns before it, in which case a contest should be brought: Steele v. Meade, 98 Ky. 614, 33 S. W. 944. If a contest be allowed for errors during elections, that remedy must be pursued: State v. Stewart, 26 Ohio St. 216. And if an appeal lies, mandamus does not; but the power of Congress to judge of the election returns of its members does not constitute another remedy within the meaning of the rule, and in such a case mandamus is the proper remedy: Ex parte Mackey, 15 S. C. 322.

It is the duty of the election officers to canvass all the votes cast, and mandamus will issue to compel its performance: State v. Stearns, 11 Neb. 104, 7 N. W. 743; State v. Barber, 4 Wyo. 56, 32 Pac. 14. So the legislative canvass of votes by the speaker is ministerial, and the writ will issue to enforce it: State v. Elder, 31 Neb. 169, 47 N. W. 710.

The writ is the proper remedy, according to several decisions, to compel the board to reconvene and recanvass the vote, and it makes no difference that they had adjourned: Belknap v. Canvassers of Ionia County, 94 Mich. 516, 54 N. W. 376; State v. Peacock, 15 Neb. 442, 19 N. W. 685; State v. Hill, 20 Neb. 119, 29 N. W. 258; People v. Schiellein, 95 N. Y. 124. Speaking in this connection, the court in State v. McFadden, 46 Neb. 668, 65 N. W. 800, said: "The law imposes upon the canvassers the duty of canvassing the returns exactly as filed with the county clerk by the election boards, and, until the canvassers have so compiled the vote, their task is uncompleted. They have no right to adjourn without day until they have finished their work. It has been repeatedly decided that after they have made one canvass, declared the result, and adjourned, they may be compelled by mandamus to reassemble and make a correct canvass of all the returns, where it appears that upon the first canvass they neglected or refused to fully perform their duty."

There is, however, another view, which holds that when a canvassing board has concluded its labors and finally adjourned, it is functus officio, and the court cannot by mandamus compel it to reconvene and recount the votes: Rosenthal v. State Canvassers, 50 Kan. 129, 32 Pac. 129.

Mandamus will not lie to compel a recanvass of votes where there is a mode of contesting election provided by statute: State v. Hamil, 97 Ala. 107, 11 South. 892; Houston v. Steele (Ky.), 28 S. W. 662.

The writ will issue to compel election officers to make further returns and to correct errors, where the returns are defective: People v. City of Syracuse, 88 Hun, 203, 34 N. Y. Supp. 661; and to convene and declare the result of an election: Morgan v. County Court, 53 W. Va. 372, 44 S. E. 182.

v. Compelling Holding County Office at County Seat.—The writ of mandate is the proper remedy to compel judges to hold their court and county officers their offices at the county seat: Calaveras County v. Brockway, 30 Cal. 325; State v. Walker, 5 S. C. 263; and a justice of the peace to hold his office in the precinct for which he was elected: State v. Shropshire, 4 Neb. 411.

As to whether the validity of an election to remove a county seat can be tested by proceedings of this character there is a conflict, it being held proper in State v. Saxton, 11 Wis. 27, while in State v. Stockwell, 7 Kan. 98, an election contest is held to be the only proper proceeding.

III. Judicial Officers and Tribunals.

a. Compels Action, but not Particular Manner of Action.—Judicial, as well as ministerial, officers fall within the operation of the writ of mandate, and will be compelled thereby to perform the duties incumbent upon them by virtue of their office. It will not lie to control the exercise of such discretion as they may be vested with, in the absence of gross abuse thereof: Ex parte McKissack, 107 Ala. 493, 18 South. 140; People v. Graham, 16 Colo. 347, 26 Pac. 936; Manor v. McCall, 5 Ga. 522; Chicago etc. R. Co. v. Wilson, 17 Ill. 113; People v. Knickerbocker, 114 Ill. 539, 53 Am. Rep. 879, 2 N. E. 507; Goheen v. Myers, 57 Ky. (18 B. Mon.) 423; Richardo v. Court of Common Pleas, 38 N. J. L. 182; Ex parte Nelson, 1 Cow. 417; Hull v. Oneida Supervisors, 19 Johns. 259, 10 Am. Dec. 223; Little v. Morris, 10 Tex. 263; Ex parte Denver etc. Ry. Co., 101 U. S. 711; but it does not lie when the act done is outside the discretion of the officer: Virginia v. Rives, 100 U. S. 313. The employment of the writ to compel judicial action is excellently expressed in Page v. Copton, 30 Gratt. 415, where the court said: "It may be appropriately used and is often used to compel courts to act where they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done; to compel the court to hear and decide where they have jurisdiction, but not to predetermine the decision to be made; to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered." And such is undoubtedly the law in every jurisdiction: Appling v. Bailey, 44 Ala. 333; State v. Williams, 69 Ala. 311; Ex parte Williamson, 8 Ark. 424; Beguhl v. Swan, 39 Cal. 411; Commonwealth v. Boone County Court, 82 Ky. 632; State v. Taylor, 32 La. Ann. 977; Board of Police v. Grant, 17 Miss. (9 Smedes & M.) 77, 47 Am. Dec. 102; City of Vicksburg v. Rainwater, 47 Miss. 547; Miltenberger v. County Court, 50 Mo. 172; State v. St. Louis Court, 87 Mo. 374; State v. Churchill, 37 Neb. 702, 56 N.

W. 484; People v. Chapin, 39 Hun, 230, affirmed 103 N. Y. 635, 8 N. E. 368; People v. Barnes, 114 N. Y. 317, 20 N. E. 609, 29 N. E. 739; Commonwealth v. McLaughlin, 120 Pa. St. 518, 14 Atl. 377; Weeden v. Town Council, 9 R. I. 128, 98 Am. Dec. 373; Williams v. Saunders, 45 Tenn. (5 Cold.) 60 People v. Van Tassel, 13 Utah, 9, 43 Pac. 625; State v. Parker, 12 Wash. 685, 42 Pac. 113; Knickerbocker Ins. Co. v. Comstock, 83 U. S. (16 Wall.) 258; In re Parsons, 150 U. S. 150, 14 Sup. Ct. Rep. 50; Finn v Hoyt, 52 Fed. 83.

So where a cause was improperly continued over the objection of a party, the writ was issued to compel the court to proceed with the trial: Dixon v. Feild, 10 Ark. 243. But see State v. Judge, 15 La. 521.

b. **Compels Court to Take Jurisdiction.**—Mandamus lies to compel an inferior court to take jurisdiction, and to proceed in the due exercise thereof: State v. Eddy, 10 Mont. 311, 25 Pac. 1032; State v. Smith (Ohio), 68 N. E. 1044; Wheeling etc. Ry. Co. v. Paull, 39 W. Va. 142, 19 S. E. 551; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. Rep. 221; In re Connaway, 178 U. S. 421, 20 Sup. Ct. Rep. 951. Therefore where a court has wrongfully dismissed an action, because, in his opinion, he had not jurisdiction therein, the writ will issue: State v. Judge, 37 La. Ann. 109; State v. Hunter, 3 Wash. 92, 27 Pac. 1076; State v. McClinton, 17 Wash. 45, 48 Pac. 740. See, however, McBride v. Murray, 72 Hun, 394, 25 N. Y. Supp. 431. So where a judge wrongfully refuses to proceed with the trial of a cause, sustaining an objection to his own competency, which is in fact unfounded, mandamus lies: Ex parte Alabama State Bar Assn., 92 Ala. 113, 8 South. 768; State v. Young, 31 Fla. 594, 34 Am. St. Rep. 41, 12 South. 673, overruling State v. Van Ness, 15 Fla. 317.

The writ was held the appropriate remedy where the inferior court refused to entertain jurisdiction on a matter preliminary to a hearing on the merits: Brown v. Mesnard, 105 Mich. 653, 63 N. W. 1000; and also where the judge refused to go into the merits of the action on an erroneous construction of some question of practice preliminary to the whole case: State v. Ellis, 41 La. Ann. 41, 6 South. 55.

If an attorney, having accepted the appointment of judge ad hoc to try a case and entered on the trial, afterward refuses to proceed therewith, mandamus will not lie: State v. Chargois, 30 La. Ann. 1102.

c. **Cannot Take Place of Appeal or Writ of Error.**—The general rule is that mandamus is not the proper remedy by which to correct or reverse erroneous rulings of inferior tribunals: Ex parte Bottoms, 46 Ala. 312; State v. King, 32 Fla. 416, 13 South. 891; State v. Norton, 20 Kan. 506; State v. Judge, 43 La. Ann. 826, 9 South. 640; Delhi School District v. Circuit Judge, 49 Mich. 432, 13 N. W. 806; State v. Judge, 1 Mo. App. 543; Dunklin County v. District Court, 23 Mo. 449; State v. Holliday, 35 Neb. 327, 53 N. W. 142; State v. Holmes, 38 Neb. 355, 56 N. W. 979; People v. Judges, 3 How. Pr. 30; Newlin v.

Indiana County, 123 Pa. St. 541, 16 Atl. 737; Weeden v. Town Council, 9 R. I. 128, 98 Am. Dec. 373; Foster v. Redfield, 50 Vt. 285; Ex parte Hoyt, 38 U. S. (13 Pet.) 279; Ex parte Flippin, 94 U. S. 348. That there have been contrary decisions, see City of Huron v. Campbell, 3 S. Dak. 309, 53 N. W. 182.

Appeal or writ of error alone will accomplish the purposes of review and correction, and mandamus will not be allowed to supplant these, in accordance with the general principle that where relief may be obtained through the ordinary channels of the law the writ is not an appropriate remedy: Ex parte Morris, 44 Ala. 361; Ex parte Southern Tel. Co., 73 Ala. 564; Ex parte Williamson, 8 Ark. 424; Early v. Mannix, 15 Cal. 149; People v. Clerk of District Court, 22 Colo. 280, 44 Pac. 506; Shine v. Kentucky Cent. R. Co., 85 Ky. 177, 3 S. W. 18; State v. Judge, 10 La. Ann. 420; State v. Judge, 12 La. Ann. 342; Olson v. Circuit Judge, 49 Mich. 85, 13 N. W. 369; Haney v. Circuit Judge, 101 Mich. 392, 59 N. W. 662; State v. Lubke, 85 Mo. 338; State v. Megown, 89 Mo. 156, 1 S. W. 208; People v. Superior Court, 18 Wend. 575; Ex parte Bostwick, 1 Cow. 143; People v. Lott, 42 Hun, 408; Ewing v. Cohen, 63 Tex. 482; State v. Morris, 86 Tex. 226, 24 S. W. 393; State v. Allen, 8 Wash. 168, 35 Pac. 609; State v. Superior Court, 24 Wash. 438, 64 Pac. 727; State v. Taylor, 19 Wis. 566; Ex parte Baltimore etc. R. Co., 108 U. S. 566, 2 Sup. Ct. Rep. 876; In re Morrison, 147 U. S. 14, 13 Sup. Ct. Rep. 246; American Const. Co. v. Jacksonville etc. Ry. Co., 148 U. S. 372, 13 Sup. Ct. Rep. 758; United States v. Swan, 65 Fed. 647, 13 C. C. A. 77, 31 U. S. App. 112.

In Terrell v. Greene, 88 Tex. 539, 31 S. W. 631, the court said: "If a judge of the district court or other officer, by the construction placed upon the law, deprives a citizen of an unquestioned legal right under circumstances that the citizen has no right of appeal, and therefore no other adequate remedy, then a court having power conferred upon it by law to issue a writ of mandamus has the right to review the judgment or decision of the trial court or officer upon such question." So an order made by an inferior court improperly staying all proceedings therein till further order, is not appealable, and mandamus lies to compel the court to proceed: Rhodes v. Craig, 21 Cal. 419.

In In re Rice, 155 U. S. 396, 15 Sup. Ct. Rep. 149, it was held that the writ of mandate could not be used to take the place of an appeal or writ of error, even though no appeal or writ of error was given by law. See, also, Railroad Co. v. Shinn, 60 Kan. 111, 55 Pac. 346, and Roberts v. Paul, 50 W. Va. 528, 40 S. E. 470, holding that it will not lie in many cases where the party is without remedy by appeal or writ of error.

The same rule applying to other remedies, that, in order to bar mandamus, they must be adequate, applies with equal force to appeals: First Nat. Bank v. Cheney, 120 Ala. 117, 23 South. 733. But delays incident to reviewing judgments in the ordinary way do not,

of themselves, constitute such an inadequacy in the relief as to justify the issuance of mandamus: State v. Neville, 110 Mo. 345, 19 S. W. 491. But see Michigan etc. Ins. Co. v. Donovan, 112 Mich. 270, 70 N. W. 582, where it is stated that if the slowness of the ordinary legal forms is likely to produce such immediate injury or mischief as ought to be prevented, the rule does not apply, and the writ will be granted.

Where an inferior court enlarged the terms of a mandate to it by the appellate court, thus acting beyond its jurisdiction, though that question might have been raised by a new writ of error, still, in view of the expense and delay to be caused thereby, and that a supersedeas with bond would be necessary thereto, such remedy was held not to be fully adequate, and mandamus was the proper remedy: North Alabama Development Co. v. Orman, 71 Fed. 764, 18 C. C. A. 309, 30 U. S. App. 646.

d. Allowance of Appeals.

1. **In General.**—The giving of judgment will be compelled by mandamus in order that an appeal or writ of error may lie therefrom: Ex parte Bradstreet, 32 U. S. (7 Pet.) 634; Havens v. Stewart, 7 Idaho, 298, 62 Pac. 682; State v. Judge, 32 La. Ann. 296. And if the inferior court refuses to grant the right of appeal, mandamus will lie to enforce it: McCreary v. Rogers, 35 Ark. 298; Gresham v. Pyron, 17 Ga. 263; State v. Judge, 23 La. Ann. 768; Ex parte South etc. R. Co., 95 U. S. 221. If a circuit court wrongfully refuses to grant a remedial writ to review the proceedings of an inferior tribunal, the supreme court will award a mandamus: John v. State, 1 Ala. 95.

Where an appellant has in due time taken all the necessary steps to perfect an appeal from the judgment of a justice of the peace, and the justice fails to send up to the appellate court the transcript, he may be compelled by mandate to do so, even after the expiration of the time limited for so doing: State v. Cressinger, 88 Ind. 499. It will also lie to compel the correction of erroneous entries by a probate judge in the record of appeal: Taylor v. Gillette, 52 Conn. 216.

Certiorai, and not mandamus, is the proper remedy where an inferior court irregularly sustains an appeal and proceeds to hear and determine the matter: Jones v. Allen, 13 N. J. L. 97. And where a judge has dismissed an appeal on the ground that the surety is not good, he cannot be compelled by mandamus to send up the record, the proper remedy to prevent him from executing the judgment being by prohibition: State v. Judge, 24 La. Ann. 316.

In dismissing an appeal from a justice's court, a district court acts judicially, and mandamus does not lie, even though there be no remedy by appeal or error: Railroad Co. v. Shinn, 60 Kan. 111, 55 Pac. 346. See, however, Dyer v. Ludlum, 16 N. J. L. 531. But it does lie to compel the dismissal of a nonappealable order appealed from: Palmer v. Circuit Judge, 90 Mich. 1, 50 N. W. 1086.

2. **Prescribing Appeal Bonds.**—The trial judge cannot defeat the right of a party to appeal from his decision, and if he refuses to prescribe the penalty and condition of an appeal bond, mandamus is the appropriate proceeding to compel the performance of this duty: Ex parte Planters' etc. Ins. Co., 50 Ala. 390; Northwestern etc. Ins. Co. v. Park Hotel Co., 37 Wis. 125. So it will lie to compel a court to fix the amount of a bond to stay the operation of a writ of possession, upon an appeal: Green v. Hebbard, 95 Cal. 39, 30 Pac. 202.

e. Signing and Entering Judgment.

1. **When Rendered by Court.**—Mandamus lies to compel a judge to sign a judgment rendered by him: State v. Judge, 28 La. Ann. 451; or by his predecessor in office: Life etc. Ins. Co. v. Wilson, 133 U. S. (8 Pet.) 291; and is the proper remedy for the refusal of a judge to enter judgment, which it is clearly his duty to enter, where nothing remains to be done but the clerical work of entering it: Corthell v. Mead, 19 Colo. 386, 35 Pac. 741; O'Brien v. Tallman, 36 Mich. 13; Branford v. Grant, 1 N. Mex. 579. So where the plaintiff failed to appear, it will lie to compel a justice to enter a judgment of nonsuit: Cagney v. Wattles, 121 Mich. 469, 80 N. W. 245.

2. **On Verdict of Jury.**—The rule is the same where a jury has been had in a case, and the writ issues to compel a judge to receive and enter a verdict, and to give judgment thereon: Munkers v. Watson, 9 Kan. 668; State v. Knight, 46 Mo. 83; State v. Adams, 12 Mo. App. 436; State v. Adams, 76 Mo. 605; State v. Beall, 48 Neb. 817, 67 N. W. 868; Cortelyou v. Ten Eyck, 22 N. J. L. 45.

In Lloyd v. Brinck, 35 Tex. 1, this matter was discussed, the court saying: "Under our system of legal jurisprudence, it is the office and duty of the judge to preside over and direct the investigation into the legal rights and responsibilities of his fellowman; to decide all questions of law that may arise, and to receive and record the verdicts of the juries, who are the exclusive judges of the facts of a case. It is the province of the judge or court to decide what facts are legitimate and proper to be submitted to a jury; but when once submitted, the court loses all further control over those facts, until directed what final judgment to enter by the verdict of the jury. The verdict is the judgment of the jury upon the facts submitted to them, and the judgment of the court must follow the verdict, and that alone. It therefore follows that the entry of the judgment of the court involves no judicial or discretionary powers, but is simply a ministerial act, which follows the verdict as a matter of course: Commissioner Gen. Land Office v. Smith, 5 Tex. 471. It is true that the law makes it the duty of the jury to decide the isues presented by the pleadings, and the law as given them by the court; and where a jury, in violation of their solemn oaths, find a verdict upon issues not presented, or where they find their verdict upon a portion only of the material issues presented, or where the verdict itself is fatally defective, in either case the verdict would be void, and no judgment

could be entered. It is also believed that should a jury find a verdict without any evidence to support it, the court would be justified in treating it as a nullity. But when the verdict is responsive to the issues presented by the pleadings, the law, and the evidence, and when it is in due form, it is believed that the court has no discretion in the matter, and must enter the judgment in conformity therewith, notwithstanding an injustice may be done thereby."

3. **On Report of Referee.**—Russell v. Elliott, 2 Cal. 245, held that mandamus would issue to compel a judge to enter judgment on the report of a referee. But in a later case in the same court it was held that appeal, and not mandate, was the proper remedy: Ludlum v. District Court, 9 Cal. 7.

Where a statute provides that when a report of referees is duly made to a justice of the peace without suit, he shall render judgment, and issue execution thereon for damages and costs, mandamus lies to enforce this duty: Dorr v. Hill, 62 N. H. 506.

f. **Correcting Errors in Judgments, Records and Dockets.**—Mandamus may issue to correct an erroneously entered judgment. So where goods held by a sheriff under an attachment are taken from him on a writ of replevin, a judgment in his favor, before the attachment proceedings are decided, must be for the return of the property and not for the special value of his lien; and if the judgment has been erroneously entered, mandamus will lie to change the journal entry thereof, the rights of third persons not being prejudiced by such change: Frederick v. Circuit Judge, 52 Mich. 529, 18 N. W. 343.

A superior court has jurisdiction to compel by mandamus a justice of the peace to make a true record of a judgment rendered by him, and furnish a copy thereof to a party properly demanding it, and to determine whether such record or copy is correct: Smith v. Moore, 38 Conn. 105.

The writ lies to compel the correction of entries in the docket of a justice of the peace, so as to make it conform to the facts: State v. Whittet, 61 Wis. 351, 21 N. W. 245. But it will not lie to compel the altering of dates therein: Mooney v. Edwards, 51 N. J. L. 479, 97 Atl. 873, where it was said: "The mere docketing of papers in a cause is, in one sense, a ministerial duty, but the entry of the specific date of the filing of the bond is a determination by the proper tribunal of the fact as to the time when the same was presented for the purposes of appeal; it thus involves the ascertainment and record of a question of fact, the entry of which cannot be regarded as a purely ministerial act." That the amendment of the record of an inferior court is a matter of judicial discretion for the court having the custody thereof, has been held in Commonwealth v. Hultz, 6 Pa. St. 469.

g. **Granting of Trial by Jury.**—There is a conflict as to whether the granting of a jury trial may, in the proper case, be enforced by

mandamus. In Carpenter v. County Commrs., 38 Mass. (21 Pick.) 258, and State v. Hart, 26 Utah, 229, 72 Pac. 938, the writ was issued. In Donohue v. Superior Court, 93 Cal. 252, 28 Pac. 1043, it was denied on the ground that an appeal might be had. A third view is taken by the Nevada court, which is that there is no default in the performance of a legal duty in refusing a jury trial, and no threats or predetermination can take the place of such default before the arrival of the time when the duty should be performed: State v. Rising, 15 Nev. 164.

h. **Awarding and Taxing Costs.**—Where a suit is dismissed by a justice of the peace for want of prosecution, mandamus is the proper remedy to compel him to enter a judgment in favor of the defendant for costs, and to issue execution thereon: State v. Engle, 127 Ind. 457, 22 Am. St. Rep. 655, 26 N. E. 1077. A contrary view is held in Peralta v. Adams, 2 Cal. 594, where an appeal or an action for costs was considered the appropriate remedy.

That mandamus will lie to reverse an order awarding costs to the wrong party, see Koenigshoff v. Spaulding, 59 Mich. 245, 26 N. W. 484.

The writ is the proper remedy to compel a justice of the peace to tax up costs in a suit in which judgment for damages and costs, or costs alone, has been recovered before him: State v. Walker, 85 Mo. App. 247. But see Ex parte Many, 55 U. S. (14 How.) 24. It will not issue, however, to compel the court to tax a particular bill of costs: State v. Circuit Judge, 3 Wis. 809.

i. **Granting or Refusing New Trial or Rehearing.**—Granting or refusing a motion for a new trial is a matter of discretion, and not controllable by mandamus in the absence of a plain abuse thereof: Detroit Tug etc. Co. v. Gartner, 75 Mich. 360, 42 N. W. 968. So where a judge has granted a new trial, thereby exercising his discretion, the writ will not lie to compel him to sign a judgment upon which the new trial was granted: State v. Watts, 8 La. 76.

A different question arises, however, where a judge refuses to hear and determine a motion for a new trial, where the relator is entitled to have him proceed, and mandamus is available: State v. Stratton, 110 Mo. 426, 19 S. W. 803. So it will lie to compel a judge or referee to settle a statement on a motion for a new trial in an action tried by him: People v. Rosborough, 29 Cal. 415; Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615; Whitmore v. Harris, 10 Utah, 259, 37 Pac. 464.

Where the granting of a rehearing is denied in the exercise of the court's jurisdiction, mandamus will not lie to compel it: State v. Judge, 39 La. Ann. 664, 2 South. 215; but it will where the rehearing was improperly refused: Chastain v. Armstrong, 85 Ala. 215, 3 South. 788.

j. **Approval of Bonds—Requiring Necessary Bond.**—A judicial officer cannot be compelled by mandamus to approve a bond, where he is required by law to judge of the solvency of the sureties, that

action being at least quasi judicial: McDonald v. Jenkins, 93 Ky. 249, 19 S. W. 594.

Several cases, dealing with the approval of official bonds, are to the effect that such approval or rejection are essentially ministerial acts, though coupled with a discretion, and controllable by mandamus: Ex parte Candee, 48 Ala. 386; State v. Lafayette County Court, 41 Mo. 221; State v. County Court, 41 Mo. 247. But in State v. Bowen, 6 Ala. 511, it was held that the writ would not lie to compel a judge to accept a bond tendered by a sheriff, he having adjudged it insufficient and declared the office vacant on that account. That supersedeas, rather than mandamus, will issue in the case of the rejection of a bond, see Ex parte Milwaukee etc. R. Co., 72 U. S. (5 Wall.) 188.

If a judge allows an action without requiring the statutory bond, or he accepts one that is insufficient, mandamus will lie to correct his rulings: Wilson v. Duncan, 114 Ala. 659, 21 South. 1017.

k. Changing Place of Trial.

1. **Change of Venue Generally.**—A change of venue cannot be obtained by means of mandamus where the remedy is by appeal: San Joaquin County v. Superior Court, 98 Cal. 602, 33 Pac. 482; People v. McRoberts, 100 Ill. 458; People v. Church, 103 Ill. App. 132; Ex parte Chambers, 10 Mo. App. 240; and such was the rule formerly in Wisconsin: State v. Washburn, 22 Wis. 99; but as the order is now unappealable, the writ of mandate is the proper remedy to compel the granting of a change: State v. Dicks, 103 Wis. 407, 79 N. W. 421. Nor will it lie to vacate an order changing the place of trial: People v. Hubbard, 22 Cal. 34; nor to compel a court to proceed after having made such order: People v. Sexton, 24 Cal. 78.

In Town of Danville v. Blackwell, 80 Va. 38, the writ issued to compel the removal of a case, where the duty of removal was absolute.

If no other adequate remedy by appeal is given, mandamus will lie to enforce a change of venue: State v. Brumley, 53 Mo. App. 126; State v. McCracken, 60 Mo. App. 650; State v. Dick, 103 Wis. 407, 79 N. W. 421. And the same applies where it is the mere ministerial duty of the clerk, upon a proper showing, to make an order for a change of venue: State v. Shaw, 43 Ohio St. 324, 1 N. E. 753.

Where a cause has been rightfully remanded to the court of another county, mandamus will lie to compel that court to proceed with the trial of the case: State v. O'Bryan, 102 Mo. 254, 14 S. W. 933.

2. **Remanding Cause from United States to State Court.**—Mandamus lies at the instance of a state to compel the remanding of a criminal prosecution to one of its own courts, there commenced, and of which, without due proceedings for removal, the circuit court of the United States has assumed jurisdiction: Commonwealth of Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. Rep. 536.

3. **Where Judge is Personally Interested in Cause.**—Where a judge is personally interested in a cause, which he refuses to transfer, mandamus is the appropriate remedy to compel such transfer: State v. Castleberry, 23 Ala. 85; Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848; Graham v. People, 111 Ill. 253; State v. Judge, 21 La. Ann. 51.

I. Issuing and Dissolving Injunctions.

1. **Issuing.**—How far mandamus proceedings may be resorted to to enforce the granting of injunctions presents an interesting question. The general rule, undoubtedly, is that this is an act involving the exercise of judicial discretion, and, consequently, not controllable by mandamus: McMillen v. Smith, 26 Ark. 613; State v. Judge, 28 La. Ann. 905, 26 Am. Rep. 115. But see Ex parte Conway, 4 Ark. 302.

It will not lie to compel the issuance of an injunction, where, in the opinion of the judge, the bill shows no equity: State v. Wilson, 49 Mo. 146. But it will issue if the judge refuses an injunction when the decisions of the supreme court allow it, but he disagrees with them: Dodge v. Circuit Judge, 118 Mich. 189, 76 N. W. 315.

A writ of mandate may issue to compel the granting of an injunction in a case sufficiently clear on the facts and involving no question of law, and where, therefore, the court is without discretion to refuse it: State v. Judge, 32 La. Ann. 549; State v. Lazarus, 36 La. Ann. 578. In State v. Young, 38 La. Ann. 923, the supreme court issued the writ to compel a district judge to grant an injunction restraining the collection of a tax authorized by a certain act, until its alleged unconstitutionality could be judicially determined.

2. **Dissolving.**—As a general rule, the writ is inappropriate to control the discretion of an inferior judge in granting an injunction, and will, therefore, not lie to dissolve such injunction: Ex parte City Council, 24 Ala. 98; State v. Judge, 36 La. Ann. 394; State v. Judge, 38 La. Ann. 49; Citizens' Bank v. Webre, 44 La. Ann. 1081, 11 South. 706; Stenglein v. Beach (Saginaw Circuit Judge), 128 Mich. 440, 87 N. W. 449.

It will not lie to set aside an injunction, although irregular, if there is no imperative necessity therefor; and if the mischief can be as well settled by appeal, that is the proper remedy: Mills v. Circuit Judge, 77 Mich. 210, 47 N. W. 128; City of Detroit v. Circuit Judge, 79 Mich. 384, 44 N. W. 662.

Where, however, serious injury would result from the granting of an illegal injunction and subject the party affected thereby to the risk of contempt proceedings for disregarding it, it will be dissolved by mandate: Tawas etc. R. Co. v. Circuit Judge, 44 Mich. 479, 7 N. W. 65. And the same holds true where the bill upon which the injunction was granted was devoid of substance, and could not support the application for the writ: Van Norman v. Circuit Judge, 45 Mich. 204, 7 N. W. 796. If questions of law alone are presented, it has been held that the writ lies to compel the dissolution of an in-

junction: Thomas v. Adsit, 116 Mich. 106, 74 N. W. 381; Bogert v. Circuit Judge, 118 Mich. 457, 76 N. W. 983.

m. **Admission and Reinstating of Attorneys.**—The admission of an attorney to practice is a judicial act, and mandamus will not lie to enforce it: Commonwealth v. Judges, 1 Serg. & R. 187. But it is the appropriate remedy to restore an attorney who has been wrongfully disbarred or suspended: Withers v. State, 36 Ala. 252; State v. Finley, 30 Fla. 302, 11 South. 500; People v. Judges, 1 Johns. Cas. 181; Ingersoll v. Howard, 48 Tenn. (1 Heisk.) 247; Ex parte Bradley, 74 U. S. (7 Wall.) 364. "An attorney, by his admission as such, acquires rights of which he cannot be deprived, at the discretion of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocations. It is true, that, being officers of the court, attorneys are in many respects subject to the orders of the court, but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled, discretion. A mandamus to the district court would not be an interference with the discretionary powers of that court": People v. Turner, 1 Cal. 143, 52 Am. Dec. 295, and note.

In Underwood v. Circuit Judge, 97 Mich. 626, 57 N. W. 190, it was held not to be the proper remedy to review an order suspending an attorney from practicing.

n. **Dismissal of Action.**—Mandamus does not lie to compel a court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration: Ex parte Garlington, 26 Ala. 170, following Ex parte Elston, 25 Ala. 72. But it does to compel the dismissal of a suit where no security for costs was given, as required by statute: First Nat. Bank v. Cheney, 120 Ala. 117, 23 South. 733.

In Theilman v. Superior Court, 95 Cal. 224, 30 Pac. 193, the plaintiff's attorney, in a divorce suit, refused to consent to the dismissal thereof, against the express wish of their client, on the ground that their fees had not been paid. Mandamus was held not to be the proper remedy, the court saying: "The plaintiff in Theilman v. Theilman (the divorce suit), if she still wishes to dismiss the action, has an adequate remedy in a substitution of attorneys; and her affidavit and prayer for a dismissal constitute a condonation by which the defendant (petitioner herein) can at any time defeat the action."

o. **Reinstatement of Cause.**—To compel the reinstating of a cause improperly struck from the docket, mandamus has been held to lie: Ex parte State, 51 Ala. 69; State v. Court of Common Pleas, 73 Mo. 560. But a contrary view is held in Hempstead County v. Grave, 44 Ark. 317, that being considered the exercise of a judicial function. In Nevada Cent. R. Co. v. District Court, 21 Nev. 409, 32 Pac. 673, the writ was denied where a justice had wrongfully dismissed an action, to compel him to proceed and try the case, an appeal lying.

The dismissal of proceedings for want of prosecution is discretionary with the court before which the proceedings are pending, and mandate will not issue unless manifest injustice would be done: Davis v. York County Commrs., 63 Me. 369. Nor will it lie to compel a court to reinstate a cause dismissed on the ground that the record brought up was not submitted in the form prescribed by the rules of the court: State v. Judge, 37 La. Ann. 111.

Where the rights of third persons would be prejudiced by a dismissal, in the absence of another adequate remedy, mandamus will lie. In Jennings v. Pearce, 99 Ala. 303, 13 South. 605, the court quoted with approval from Brazier v. Tarver, 4 Ala. 569, which case involved the rights of a person for whose benefit a suit was instituted with another party as nominal plaintiff, and in which was used the following language: "We think it very clear that when a suit is once dismissed, at the instance of the plaintiff upon the record, the correctness of the proceeding cannot be inquired into upon a writ of error; for this course would involve the defendant in a controversy in which he has taken no part, and in which he has no interest. We do not doubt that it is the duty of a court to protect the rights and interests of those who are beneficially interested in suits or choses in action. Such suitors can and ought to be protected against the improper interference of the plaintiff on the record, but the only mode to correct erroneous action in this particular is mandamus."

Where a statute provides that a cross-bill in chancery shall be heard at the same time as the original bill, and as no appeal lies from the order of the chancellor dismissing such cross-bill, before the final determination of the cause, mandamus is the proper remedy to compel the setting aside of such order of dismissal, and to restore the cross-bill on the docket, to abide the final determination of the whole cause: Ex parte Thornton, 46 Ala. 384.

p. **Granting Continuance.**—Granting, or refusing to grant, a continuance is discretionary, and not controllable by mandamus: Ex parte Jones, 66 Ala. 202; at least in the absence of a palpable abuse: Ex parte Hutt, 14 Ark. 368. In Whaley v. King, 92 Cal. 431, 28 Pac. 579, the court refused to compel by mandate a justice to dismiss an action in which he had erroneously granted a continuance.

q. Vacating and Setting Aside Orders and Decrees.

1. **Various Instances.**—The writ has been frequently used to vacate illegal orders. So where a cause had been regularly removed, but the court from which it was transferred assumed to treat it as still within its jurisdiction and vacated the order of removal, mandamus issued to compel it to vacate the latter order: People v. Circuit Judge, 39 Mich. 115.

It has been held appropriate to vacate the service of a civil capias wrongfully issued: Baldwin v. Circuit Judge, 48 Mich. 525, 12 N. W. 686; to set aside service of summons upon one who at the time was

outside of the jurisdiction in which he lived and was there only to attend as a necessary witness in other cases: Mitchell v. Circuit Judge, 53 Mich. 541, 19 N. W. 176; to vacate an order of discovery compelling the production and deposit of a party's business books, where such order was not properly granted: People v. Judge, 38 Mich. 351; and it is the only adequate remedy to vacate an interlocutory order not touching the merits: People v. Judge, 41 Mich. 326, 2 N. W. 26. If an amendment by a sheriff on his return is improperly permitted, plaintiff prejudiced thereby may have a mandamus to vacate the order allowing it: Kemp v. Porter, 6 Ala. 172.

Mandamus is the proper proceeding to set aside a judgment, where proof of posting notice of trial, which is required, was defective: People v. Bacon, 18 Mich. 247. That mandamus may lie to set aside a nonsuit where the plaintiff was prevented by a misapprehension from being in court, see Lindsay v. Circuit Judge, 63 Mich. 735, 30 N. W. 590.

2. **Defaults.**—Setting aside a default is discretionary, and the writ of mandate will not lie to control it: Ex parte Roberts, 31 U. S. (6 Pet.) 216. See, also, Ex parte Bacon, 6 Cow. 392. In Ex parte Bell, 48 Ala. 285, the court refused the writ to compel the setting aside of a default judgment and to let in a technical defense, founded on defective service of process, where the application showed no meritorious defense to the action, the court saying: "Mandamus is in the nature of an equitable remedy. The petitioner who seeks its assistance must show that he has suffered some substantial injury to some well ascertained right. Here, there was no proof that the debt was not just and due, and a subsisting claim. The petitioner does not assert that he has any meritorious defense to the note. He merely seeks the use of a remedy, where he shows no meritorious right to redress. The applicant in this case seeks to get rid of a judgment, to which he has no defense on the merits, but if any, a merely technical defense. This would not be good in equity and is never allowed. He must show merit before he is entitled to relief."

Where a judge, on preliminary application to him, improperly grants a supersedeas, mandamus lies to vacate such order: Ex parte Walker, 54 Ala. 577.

r. **Matters Dealing with Probating and Settling Estates.**—Where a probate judge, or ordinary, refuses to grant letters of administration, mandamus will not lie to review such refusal: Barksdale v. Cobb, 16 Ga. 13; People v. Probate Judge, 36 Mich. 500. Nor will it to compel the probating of a will, where he had decided that he had not jurisdiction, the remedy being by appeal: Preston v. Fidelity Trust etc. Co., 94 Ky. 295, 22 S. W. 318.

Where a judge declines all proceedings in the settlement or distribution of an estate, the writ will issue, as there is no order to appeal from: Ex parte Jones, 1 Ala. 15. So it will compel a probate court, at the instance of an executor, to proceed and make a final

settlement of his accounts, when it improperly refused to do so on account of a supposed want of jurisdiction: Ex parte Dickson, 64 Ala. 188.

It will lie to compel a judge to sign a decree establishing notice to creditors, the judge having no discretion in such matter: Johnson v. Superior Court, 105 Cal. 666, 39 Pac. 36; Hensley v. Superior Court, 111 Cal. 541, 44 Pac. 232.

The writ does not lie to compel a probate judge to allow a contingent claim against the estate of a deceased person, the proper remedy being by appeal from the order of disallowance: John Hancock etc. Ins. Co. v. Probate Judge, 97 Mich. 613, 57 N. W. 189; nor to compel him to extend the time allowed for creditors to present their claims: People v. Probate Judge, 16 Mich. 204.

To compel the approval of an administrator's sale, the writ will not be granted, such being a judicial action: Trainer v. Porter, 45 Mo. 336.

s. **Reviewing Rulings on Evidence by Mandamus.**—A refusal to permit petitioner to prove certain matters in the lower court cannot be reviewed by mandamus: Tibbetts v. Campbell (Cal.), 27 Pac. 531. So it will not compel a lower court to admit certain evidence which it had rejected: Scott v. Superior Court, 75 Cal. 114, 16 Pac. 547. In Ex parte Hayes, 92 Ala. 120, 9 South. 156, the writ was refused where it was sought to compel an inferior court to vacate an order improperly relieving a party from an admission contained in an agreed statement of facts used on a former trial, the proper remedy being on appeal if the court should refuse to receive the admission as evidence on a second trial.

In State v. Judge, 46 La. Ann. 365, 14 South. 906, the court denied the writ to compel an inferior court to hear witnesses to confirm a default, where, since the application of plaintiff to confirm the default, the defendant in the lower court had filed his answer.

Where the defendants in a criminal case are by statute entitled to take the depositions of witnesses residing out of the state, mandamus lies to compel an inferior court to make the necessary order: Giboney v. Rogers, 32 Ark. 462. But it will not lie to force a circuit judge to suppress a deposition taken in a chancery suit, but the question should be raised on appeal: Chandler v. Circuit Judge, 97 Mich. 621, 57 N. W. 189.

t. **Signing Bills of Exceptions.**—Mandamus is the proper remedy to compel a judge to settle and sign a bill of exceptions or certificate of evidence: Etheridge v. Hall, 7 Port. (Ala.) 47; Gutierrez v. Hebbard, 106 Cal. 167, 39 Pac. 529; but not to compel him to sign a particular one, which he believes to be incorrect: People v. Williams, 91 Ill. 87.

In State v. Field, 37 Mo. App. 83, the trial judge refused to consider any bill of exceptions, and the court held that the writ of mandate was the proper remedy to enforce action on his part, not to advise

how he should act, but merely that he should move in the matter, the court saying: "If the party litigant, in due season, presents what he claims is a true bill of exceptions, it is the duty of the trial judge to act thereon. If true, he should allow it; if untrue, he should, while rejecting the same, indorse his refusal on the bill, and there in writing assign his reason for such refusal. If the circuit judge refuses to sign and allow a bill of exceptions because it is untrue, the appellate court will not by mandamus compel an allowance. But the judge should act—allow or disallow. He cannot be permitted to sacrifice the rights of litigants by his inaction."

u. **Filing and Striking Out Pleadings.**—Mandamus is inappropriate to compel a trial judge to permit the filing of a pleading in a cause pending before him: State v. Thayer, 10 Mo. App. 540; and see Ex parte Davenport, 31 U. S. (6 Pet.) 661. In People v. Judges, 1 Doug. (Mich.) 434, mandamus was allowed to review a motion to strike an amended declaration from the files, and the decision of the court thereon, as they would constitute no part of the common-law record of the case and could therefore not be reviewed by writ of error.

A broad discretion being allowed judges in setting off judgments on motion, mandamus does not lie to review that discretion where a judge refused a motion to allow one judgment to be set off against another: People v. Circuit Judge, 39 Mich. 21.

v. **Enforcing Stipulations Between the Parties.**—Mandamus does not lie to enforce a disputed stipulation to settle a case: Leavitt v. Judge, 52 Mich. 595, 18 N. W. 374; nor to compel a judge to sign findings according to a stipulation between the parties, such not being strictly an act connected with his official duties: State v. McArthur, 23 Wis. 427, the court saying: "Although the judge was to sign the report, yet in doing so he would not be exercising judicial functions, or be performing a strict legal duty. He signs the report because the parties have stipulated he may sign it. He acts under the stipulation, not by virtue of the power and discretion vested in him by law as an officer. Therefore we cannot see upon what principle he is to be compelled by mandamus to perform the stipulation."

w. **Allowing Substitution or Intervention of Parties.**—Allowing or denying leave to become a party to an action is discretionary, and appeal, not mandamus, is the proper remedy: Moon v. Wellford, 84 Va. 34, 4 S. E. 572. So a motion for leave to intervene in an action, made at any stage of the proceedings, presents a judicial question, and mandamus will not lie to control or review it, however erroneous it may be: People v. Sexton, 37 Cal. 532.

Where a right of action will be lost and great injustice done unless a substitution of parties be allowed, mandamus will lie to compel such substitution: Wood v. Circuit Judge, 84 Mich. 521, 47 N. W. 1103. A judgment rendered against a party to an action after his death is not void on its face; and proceedings to set aside the judg-

ment must be taken before the administrator of the decedent can apply for a mandamus to compel the court to substitute him as a party to the action: Elliott v. Patterson, 65 Cal. 109, 3 Pac. 493.

x. **Issuing Execution.**—In issuing execution upon a judgment rendered by him, a justice of the peace acts ministerially only, and the performance of this duty may be coerced by writ of mandate: Hamilton v. Tutt, 65 Cal. 57, 2 Pac. 878; Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545; Scott v. Bedell, 108 Ga. 205, 33 S. E. 903.

The supreme court cannot, however, by mandamus control the manner in which the judgments of a lower court, when affirmed, are to be enforced: Rohmeiser v. Bannon, 15 Ky. Law Rep. 114, 22 S. W. 27. But when it is shown that the judge of an inferior tribunal has denied to a party entitled an order essential to the speedy execution of its decrees, mandamus will lie if no good cause is shown on a rule nisi why it was refused: Ex parte Sibert, 67 Ala. 349.

y. **Quashing and Reinstating Attachments.**—Mandamus is the appropriate remedy to reinstate an attachment which has been improperly dismissed: Boraim v. Da Costa, 4 Ala. 393; and also to revise the action of an inferior court in quashing or refusing to quash an ancillary attachment: Gee v. Alabama etc. Trust Co., 13 Ala. 579. But it does not lie to quash an original attachment, upon a motion merely, which is always addressed to the discretion of the court: Ex parte Putnam, 20 Ala. 592.

yy. **Forcing Inferior Court to Carry Out Mandate of Supreme Court.**—For compelling an inferior court to obey the decrees and judgments of the supreme courts, mandamus is the proper remedy: Johnson v. Glascock, 2 Ala. 519; In re Walter, 89 Ala. 237, 18 Am. St. Rep. 103, 7 South. 400; Cox v. Thomas, 11 La. 366; State v. Norris, 61 Neb. 461, 85 N. W. 435; Wells v. Littlefield, 62 Tex. 28; Koonce v. Doolittle, 48 W. Va. 592, 37 S. E. 644; Ex parte Washington etc. R. Co., 140 U. S. 91, 11 Sup. Ct. Rep. 673.

An excellent summary of the law on this subject is given by Justice Gray, in In re Sanford etc. Tool Co., 160 U. S. 247, 16 Sup. Ct. Rep. 291, in the following words: "When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded: Sibbald v. United States, 12 Pet. 488, 492; Texas etc. Ry. v. Anderson, 149 U. S. 237, 13 Sup. Ct. Rep. 843. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled,

either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court: Perkins v. Fourniquet, 14 How. 313, 330; In re Washington etc. R., 140 U. S. 91, 11 Sup. Ct. Rep. 673; City Bank v. Hunter, 152 U. S. 512, 14 Sup. Ct. Rep. 675; City Bank, Petitioner, 153 U. S. 246, 14 Sup. Ct. Rep. 804. But the circuit court may consider and decide any matters left open by the mandates of this court; and its decision of such matters can be reviewed by a new appeal only: Hinckley v. Morton, 103 U. S. 764; Mason v. Pewabic Co., 153 U. S. 361, 14 Sup. Ct. Rep. 847; Nashua etc. R. R. v. Boston etc. R. R., 5 U. S. App. 97. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly: Sibbald v. United States, 12 Pet. 488, 493; West v. Brashear, 14 Pet. 51; Supervisors v. Kennicott, 94 U. S. 498; Gaines v. Rugg, 148 U. S. 228, 13 Sup. Ct. Rep. 611."

That the supreme court will not, under a general remanding order, award a writ of mandamus to compel the inferior court to enter any particular order in the case, see Blatchford v. Newberry, 100 Ill. 484.

2. Criminal Proceedings.

1. **In General.**—Mandamus has often been sought in matters relating to criminal charges, and allowed where there was a clear legal right and no other adequate remedy. So it lies to compel a justice of the peace to proceed with the preliminary examination of one regularly charged with a crime and brought before him under arrest, where this duty is especially enjoined by statute on that officer, and his refusal to proceed is not justified by the mere statement of the accused's attorney that an examination for the same offense had been had before another magistrate, and the defendant there held to answer: People v. Barnes, 66 Cal. 594, 6 Pac. 698. It will issue to compel a justice of the peace to issue a warrant for the violation of a criminal statute: Benners v. State (Ala.), 26 South. 942; to compel the reinstatement of a criminal case discontinued for an insufficient reason: Ex parte State, 115 Ala. 123, 22 South. 115; to enforce a change of venue in a criminal case, if improperly denied: Ex parte Chase, 43 Ala. 303, overruling Ex parte Banks, 28 Ala. 28; and it also lies to set aside an order made for a change of venue in a criminal case, in the absence of the accused, and where he was not represented by counsel: Ex parte Bryan, 44 Ala. 402.

A justice of the peace may be compelled by the writ to render judgment on a verdict returned on a criminal prosecution, no matter how erroneous he may deem it to be, where he has no power to set aside such verdicts; but he cannot be forced to enter judgment upon a verdict which is utterly null: Moore v. State, 72 Ind. 358. And it lies to compel him to impose sentence, where he has no discretion,

after conviction, to suspend judgment during the good behavior of the defendant: People v. Court of Sessions, 8 N. Y. Cr. Rep. 355, 19 N. Y. Supp. 508, affirmed in 66 Hun, 550, 21 N. Y. Supp. 659; and to act in the matter of giving bail: Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. Rep. 450.

A decision quashing an indictment may be properly reviewed by mandamus: People v. Swift, 59 Mich. 529, 26 N. W. 694, the court saying: "There is, however, a serious objection to the writ of error for such a purpose under our practice: that it involves delay, and does not lead as readily as a mandamus to a trial on the merits, which public policy requires should not be unduly delayed; and in cases where the refusal of the inferior court to entertain a case is for some supposed want of jurisdiction, a mandamus has been usually regarded as more appropriate, although the lines are not closely drawn. In Queen v. Justice of Middlesex, 2 Q. B. Div. 516, the office of a mandamus to set an inferior court in motion was recognized as applicable, where it has refused to entertain jurisdiction on some matter preliminary to a hearing on the merits, and would reach just such a case as this. Other cases cited on the argument are also in point; and, in Attorney General v. Police Justice, 40 Mich. 631, we ourselves issued a mandamus to compel the police justice of Detroit to entertain a complaint: See, also, King v. Mawbey, 6 Term Rep. 628; Regina v. Adamson, 1 Q. B. Div. 201. Judgment on a writ of error, in such a case, would merely vacate the order to quash, and while, no doubt, the recorder's court would in such case proceed, yet the real purpose of this application is to speed the trial, and a mandamus seems more fitting than a writ of error where that duty would be inferred rather than expressed. The duty of an appellate court is to mold its process, if possible, so as to reach the proper end, and we have no doubt a mandamus is better than any other writ in a case like the present, where there has been no action below on the merits."

The writ is not the proper remedy to compel the dismissal of an action, upon failure to dismiss for want of prosecution, such being an exercise of judicial discretion upon a judicial question, where a statute provides that the court must, unless good cause to the contrary is shown, order the prosecution to be dismissed, if the defendant whose trial has not been postponed upon his application is not brought to trial within sixty days after the finding of the indictment, or filing of the information: Strong v. Grant, 99 Cal. 100, 33 Pac. 733. Nor is it proper to compel a court to discharge a person alleged to be improperly detained under process issued by such court: Ex parte Graves, 61 Ala. 381.

The writ will not issue to procure the petitioner's discharge from custody and further prosecution under an indictment, where the facts relied on are available as a defense under the plea of former ac-

quittal or of former jeopardy: Ex parte Clements, 50 Ala. 459; Ex parte Cage, 45 Cal. 248.

2. **Habeas Corpus Proceedings.**—Mandamus lies to compel a judge, before whom a prisoner is brought, to grant a hearing upon a writ of habeas corpus: Ex parte Mahone, 30 Ala. 49, 68 Am. Dec. 111; Ex parte Charleston, 107 Ala. 688, 18 South. 224. But it will not issue to compel a judge to award a writ of habeas corpus, upon his refusal to do so: Ex parte Jones, 94 Ala. 33, 10 South. 429, where the court remarked: "Whether the writ of habeas corpus will be awarded in any case is a judicial question; it is not to be granted as matter of course, but such facts must be made to appear to the judge to whom the petition therefor is presented as in his judgment prima facie entitle the petitioner to the writ: Ex parte Campbell, 20 Ala. 89; Hurd on Habeas Corpus, 219-222. . . . . And this power to determine in limine whether the writ should issue is essentially judicial power, the exercise of which may be revised on appellate application to this court, but never by a mandamus commanding the judge below to do that which he has determined he should not do: High on Extraordinary Legal Remedies, sec. 155.

"We do not think that the cases of Ex parte Mahone, 30 Ala. 49, 68 Am. Dec. 111, and Ex parte Champion, 52 Ala. 311, to which our attention has been invited, conflict with the foregoing views, at least so far as the matters really decided are concerned. Had the judge awarded the writ, and then refused to proceed with the case, the cases cited would be in point, and mandamus would lie, not to control his action, but merely to compel him to take some action, to hear and determine the matter involved in the premises. But he did not do this. His only action was to refuse to award the writ. This being judicial action—not a failure or refusal to act—as we have seen, mandamus is not petitioner's remedy, and his application therefor is denied."

3. **Contempt Proceedings.**—Where a trial court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon the plaintiff demanded an attachment for contempt, which was refused on the ground that the appeal superseded the injunction, a mandamus was issued to compel the trial judge to issue the attachment, the plaintiff's remedy by appeal being inadequate: Merced Min. Co. v. Fremont, 7 Cal. 130. But where an injunction, granted on an ex parte application, was modified on motion of the defendant, without notice to plaintiff, on defendant's giving bond, the court held that subsequent acts of the defendant, in violation of the original injunction, were not in contempt, and refused to compel the issuance of an attachment therefor by mandate, the proper remedy for any error in modifying the injunction being by appeal: Fremont v. Merced Min. Co., 9 Cal. 18.

It will not lie to vacate an order of a circuit judge, adjudging a party to a suit guilty of contempt of court in refusing to pay costs

awarded against him on a continuance, the proper remedy being certiorari: Love v. Circuit Judge, 97 Mich. 625, 57 N. W. 190.

zz. **Miscellaneous Instances.**—Mandamus has been held to be the proper remedy to require a probate judge to report all fees received by him by virtue of his office: Finley v. Territory (Okla.), 73 Pac. 273; to set apart widow's exemption: Leslie v. Tucker, 57 Ala. 483; to compel a chancellor to grant a wife in a divorce suit alimony pendente lite, there being no other adequate remedy: Ex parte King, 27 Ala. 387; to require a county court to show cause why it refused to approve and qualify a deputy appointed by a sheriff: Applegate v. Applegate, 61 Ky. (4 Met.) 236, following Day v. Justices, 42 Ky. (3 B. Mon.) 98; to set aside an order for a prohibition, when it was improperly granted by a circuit judge, to restrain a probate judge from acting on an application for bail, which was within his jurisdiction: Ex parte Keeling, 50 Ala. 474.

It has been held not to lie to compel the appointment of commissioners to set off dower, there being a remedy by appeal: Pulling v. Probate Judge, 97 Mich. 605, 57 N. W. 187; or to control the discretion of a court in referring causes to a master in chancery: People v. Williams, 55 Ill. 178.

McMILLAN v. NORTH STAR MINING COMPANY.

[32 Wash. 579, 73 Pac. 685.]

MASTER AND SERVANT—Duty of Mining Corporations to Keep Place Safe for Employés.—Though a mining corporation lets work in a mine to contractors, it must keep itself advised, as the work progresses, to see that the mine is not left unsafe for future employés to work in, and if mining blasts are left by which such an employé is subsequently injured without his negligence, his employer is answerable. (p. 911.)

MASTER AND SERVANT—Mining Corporations, Liability of to Employés for Negligence of Independent Contractor.—If a mining corporation employs a contractor and turns over the work of the mine to him, knowing or chargeable with notice that by his lack of skillfulness or want of diligence or due care hidden dangers may be created whereby its subsequent employés may be injured, then it is answerable to such an employé for any injuries suffered by him through such danger without his negligence. Such contractor must be held to stand in the place of the mine owner, since he delegates to the contractor, for the time being, authority to conduct the operations of the mine. (pp. 912, 913.)

MINING—Master and Servant—Risks of Employment.—Danger from an Unexploded Blast is not necessarily incident to his employment, the risk of which the miner assumes, where he is guilty of no contributory negligence. (p. 913.)

Frank T. Post, for the appellant.

Del Cary Smith and A. J. Laughon, for the respondent.

579 HADLEY, J. Respondent brought this suit against the appellant to recover damages for injuries received while he was working in appellant's mine. A tunnel had already been driven for a distance of more than two hundred feet by others who had worked under a contract with appellant, but who had quit the work. Respondent and another were employed by appellant to continue work in this tunnel. The employment was made by appellant's foreman, who directed where the work should be done. The tunnel had 580 the appearance of having been well cleaned up by the former workmen, and the foreman did not warn the respondent or his fellow-workman of any hidden danger. Neither respondent nor his associate had ever before worked in the tunnel, and neither had any knowledge of any concealed danger. Respondent was directed to work at the face of the tunnel, and his companion was ordered to work upon the "drift," a short distance from respondent. They began work in the afternoon, and continued until the morning of the second day following. Meanwhile respondent had exploded several blasts at the face of the tunnel, and on the morning above mentioned was engaged in "mucking out." A loose plank floor had been laid upon the bottom of the tunnel, near the face, in order that the broken material might be more easily shoveled. The face having been moved forward somewhat by the work of respondent, he was about preparing to move this floor nearer to the face. While engaged in cleaning and smoothing the bottom of the tunnel between the ends of the planks and the face, he was using his pick, and when he struck a place near the ends of the planks an explosion occurred, which resulted in the destruction of one of his eyes and in permanent injury to his hearing. He alleged in his complaint that the former contractors who had worked in the tunnel for the appellant had used certain explosives for blasting purposes, and that one of the charges had been so placed that it failed to discharge, and was left by them in an unsafe and dangerous condition; that he had neither knowledge nor means of obtaining knowledge of such dangerous condition, and while engaged as aforesaid he struck said unexploded blast, which caused said explosion. He further alleges that his injuries were caused by the negligence of appellant in failing to provide 581 a safe place for him to work, and that, if appellant

had used ordinary care in inspecting the tunnel before ordering him to work therein, the unexploded charge would have been discovered, but that it wholly neglected to examine the tunnel after the explosion of blasts to ascertain if all blasts had been exploded, and to see if the tunnel was in safe condition for respondent and others employed to work therein, and also failed to warn respondent of such dangerous condition. The answer denies many of the material allegations of the complaint, and alleges that after the said contractors ceased to work in the mine, and before respondent began to work therein, the appellant, through its superintendent, a skilled and competent miner, thoroughly examined and inspected the mine, and found no missing or unexploded blasts; that said inspector did not report any missing blasts or any other danger to appellant, and that it did all that was reasonably required of it to be done to ascertain the condition of the tunnel before respondent began to work therein; that whatever risks or dangers there were from unexploded blasts were incidents of respondent's employment; and were assumed by him; that respondent knew when he went to work in the tunnel that the work just previously done therein had been done by said contractors, and he had the same opportunity for knowing of the risks and dangers that appellant had A trial was had before a jury, and at the conclusion of respondent's testimony the appellant challenged the sufficiency thereof, and moved the court to instruct the jury to return a verdict for appellant. The motion was denied, and appellant thereupon rested without introducing any testimony. The cause was then submitted to the jury under instructions from the court, and a verdict for respondent was returned in the sum of three thousand three hundred and eighty dollars. Appellant [582] moved for a new trial, which was denied, and judgment was entered for the amount of the verdict. This appeal is from that judgment.

It is assigned that the court erred in not granting the motion to return a verdict for the defendant. It is admitted by the appellant that the master must use reasonable care to provide his servant with a reasonably safe place to work, under all the circumstances of the particular case. It is urged, however, that, under the circumstances of this case, if respondent was not required to be his own inspector, and did not assume the risk, then it was the duty of the appellant to carefully inspect the tunnel, but that respondent must establish by evidence two things: 1. That the appellant did not carefully inspect; and,

2. That if such inspection had been made the missing blast would have been discovered. Respondent was asked the following question: "Was there anything, Mr. McMillan, when you went to work by which you could tell or ascertain if there were any missed holes or unexploded blasts in the tunnel, or any part of it?" To which he answered "No." From the fact that respondent was an experienced miner, and says, in effect, that nothing appeared by which he could have discovered the danger, appellant reasons that its own superintendent, also an experienced miner, could not have made the discovery. There was no direct evidence that an examination was not in fact made by appellant's superintendent, and it is insisted that the burden was upon the respondent to show that no inspection was made. It is contended that, as the evidence stood, it must be presumed that an inspection was made; that, under respondent's own testimony, such inspection could not have revealed the hidden danger, and that appellant has, therefore, neglected no duty in the premises, since it is not claimed that it had actual [583] knowledge of the danger. It seems to us that a broader view must be taken of appellant's duty toward its employés. It had previously let a contract to certain persons to do specified work in its mine. While it may have contented itself with the belief that it did not need to be represented by a superintendent while that work was being done according to the contract specifications, yet, considering the hazardous nature of the mining occupation, and the well-known possibility of missing blasts, we think it was the duty of appellant to keep itself advised in that particular as the work progressed. If a trusted representative, stationed at the mine for that purpose, had kept watch of the location of the different charges, and of the conditions following the various explosions, it is not improbable that the missing blasts would have been discovered at the time, and the hidden danger avoided. Such a course would at least have lessened the probability of carelessness and of reckless oversight on the part of the contractors, and might have led to actual knowledge on appellant's part of the missing blast which seems to have caused respondent's injury. If appellant chose for the time being to turn over the work in its mine to others, knowing, as it must have known, that such hidden dangers, by oversight and lack of skillfulness, might be left by them to be encountered by other employés who should follow them, we think it should not be heard to say that it is in no way responsible for the conditions. Such persons must be

held to have stood in the place of the appellant itself, since to them had been delegated the authority to conduct the operations in the mine for the time being. In Shannon v. Consolidated etc. Min. Co., 24 Wash. 119, 64 Pac. 169, this court held that the danger from an unexploded blast is not such as is necessarily incident to the employment, the risk of which [584] must be assumed by the miner. In some cases, it is true, the miner must assume the risk—as, for instance, when the missing charge is left by himself or with his knowledge, and when he may have been warned by others that unexploded charges remain in the vicinity of his work. A reasonable degree of observation and care is, of course, required upon the part of the miner, to the end that he shall not negligently contribute to his own injury, but, when he has no knowledge of the presence of a hidden danger placed by others, he should not be required to assume the risk thereof, without regard to the necessary care upon his own part. Dangers arising from a missing blast cannot be classified with dangers which are incidental to nature's hidden forces, and which cannot be known or foreseen by human prescience. The risk of such a miner must often assume, from the nature of his occupation, and for the reason that no degree of care on the part of the master can in some instances provide against the danger. But the conditions here are quite similar to those in Shannon v. Consolidated etc. Min. Co., 24 Wash. 119, 64 Pac. 169. There the workmen were divided into shifts working at different times, each shift taking its turn. By rule established by custom in the mine, it was the duty of the boss of the off-going shift to notify the on-coming shift of any missed blasts. It was contended that that duty was neglected by the boss of the off-going shift, which left the work just before the on-coming of the shift which was at work when the accident occurred. It was held that the duty to notify the on-coming shift of the missed blast was a positive duty of the master, and that such duty having been delegated to the boss of the former shift his neglect to notify the next one was the neglect of the master. So in the case at bar the contractors who [585] had previously conducted operations in the mine sustained toward appellant and the workmen who succeeded them the relation of a former shift. Having no other delegated representative for that purpose, appellant had, in law, delegated to them the duty to notify others of the location of missed blasts. It was therefore their duty, when they left the work, either to notify appellant or the workmen who succeeded

them. As appellant's delegated representatives, their failure to notify it cannot be urged as an excuse for lack of knowledge on its part. Appellant cites Davis v. Trade Dollar Consolidated Min. Co., 117 Fed. 122, 54 C. C. A. 636, as supporting the contention that the danger from a missed blast is one incident to the work. It was held that the danger in that case was such, but it will be observed that the plaintiff there had been informed of the missed blasts before he began work, and the doctrine applied in that case is in harmony with what we have said above. We therefore think sufficient evidence had appeared, bearing upon the question of appellant's negligence, to call for the submission of the case to the jury, and that the motion for a directed verdict in appellant's favor was properly denied.

Appellant rests its chief contention upon the questions involved in the foregoing discussion. Errors are assigned upon certain instructions of the court, and upon the refusal to give others requested by the appellant. We believe, however, that the charge of the court, taken as a whole, fairly covers the law of the case relating to appellant's rights in the premises, and we believe that no prejudicial error is shown in the record. The judgment is therefore affirmed.

Fullerton, C. J., and Mount and Dunbar, JJ., concur.

The Duty and Liability of mine owners to their employés are discussed in the monographic note to Wellston Coal Co. v. Smith, 87 Am. St. Rep. 557-623. And the liability for the acts and negligence of independent contractors is discussed in the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 382-428.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

FARMER v. ST. CROIX POWER COMPANY.

[117 Wis. 76, 93 N. W. 830.]

PRACTICE—Decision upon Issues of Fact.—In a trial in equity the parties are entitled to a decision by the court upon each material issue raised by the pleadings and to such decision also in detail, at least in a reasonable degree, covering all matters not only deemed by the court material to sustain final judgment, but to those matters as to which there is a reasonable controversy respecting whether they have a material bearing on the rights of the parties or not. (p. 917.)

PRACTICE—Decision on Issues of Law.—The parties in a trial in equity are entitled to the decision of the trial judge specifically upon the various questions of law applicable to the facts found upon which the ultimate conclusions of law must rest. (p. 917.)

PRACTICE.—Failure to Make Findings and Conclusions as directed by the statute does not constitute reversible error. (p. 917.)

MECHANIC'S LIEN.—A subcontractor of a Subcontractor is not entitled to a lien under a statute giving a lien to the contractor, subcontractor, or employé of either who performs any work or labor in or about the erection of a structure or other improvement. (pp. 920, 923.)

MECHANIC'S LIEN—Employé, Who is not Within the Meaning of the Statute.—Under a statute giving a lien to a contractor, subcontractor, or employé of either, one who contracts with a subcontractor to haul material, in the execution of which contract he uses twenty or thirty horses and a number of employés, is not entitled to a lien as an employé, though in doing the work, he and his employés act under the direction of the managing agent of the subcontractor. (p. 920.)

MECHANIC'S LIEN—Contractors and Subcontractors, Who are.—The principal contractor is one standing in direct relation to the proprietor and responsible to him, permitted by the nature of his contract, ordinarily to work out the plan thereof by subletting to others if he sees fit. A subcontractor is a person whose relation to the principal contractor is substantially the same as to a part of the

work as the latter's relation to the proprietor. He takes some distinct part of the work in such a way that he does not contemplate doing merely personal services. (p. 921.)

MECHANIC'S LIEN—Employé, Who is not.—One is not entitled to a lien as an employ unless he is obligated to deliver his personal services. (pp. 921, 922.)

Action to enforce a lien claimed by the plaintiffs under section 3315 of the Statutes of 1898. The defendant company let the work of constructing its plant to Robert N. King, who sublet a portion to the Engineering Contract Company. By that company the plaintiff was, under a written contract, employed to haul cement for thirty-five cents per hundred pounds, and under a different and other contract to do all other hauling necessary to the completion of the principal contract for six dollars per day per man and four-horse team. The distance over which the material was hauled was considerable; it was not contemplated that the hauling should be done by the personal services of the complainant, and he in fact used twenty or thirty horses and a number of employés, and the total amount of his claim for services rendered was nine thousand four hundred and nineteen dollars, of which he alleged that five thousand two hundred and seventy-nine dollars remained unpaid.

The findings contained a copy of the written contract and of the notice given to comply with the requirement of the statute as to a subcontractor or employé of a subcontractor giving notice to the proprietor of the claim for a lien; a copy of the affidavit for the order of publication upon which the service of summons upon the contractor and subcontractor was based; a copy of such parts of the order of publication as were claimed to be insufficient; a finding that a large number of the items of the plaintiff's complaint were not lienable; that three thousand eight hundred and sixty-eight dollars and sixty-five cents were due plaintiff for work under his contract; that the evidence left it unascertainable as to how much of the work was performed in delivering material for use in producing the improvement covered by the principal contract, or what part of the material hauled by plaintiff was so used, or when the last lienable work was done, and that a material part was not lienable under any circumstances. There was a general conclusion that the St. Croix Power Company was entitled to a judgment dismissing the action as to it, and that plaintiff should recover against the Engineering Contract Company. The plaintiff appealed.

A. J. Kinney, for the appellant.

Baker & Haven and F. W. M. Cutcheon, for the respondent.

[79] MARSHALL, J. In the disposition of this case these important questions, among others, were presented for adjudication: 1. Is hauling material for use in making a structure or creating an improvement such as is mentioned in section 3314 of the Statutes of 1898, the performance of labor "for, in or about the erection or construction" of such structure or improvement? 2. Is a person who makes a contract to perform all or a specific part of work required in the execution of a contract, the same to be performed, not by him personally, necessarily, he being at liberty to perform the same by such servants and appliances as he may see fit to employ, an employé. 3. Was the service of a notice containing a statement of the plaintiff's claim, which included a large number of items representing manifestly nonlienable matters, the lienable and nonlienable matters being so intermixed and stated as to render it impracticable for the person receiving the notice to determine either whether all the matters are lienable or if not [80] to separate those which are lienable from which are not, a compliance with the statute? 4. Was the notice served in this case a compliance with the statute irrespective of the subject last mentioned? 5. Was the lien petition sufficient under the statute? 6. Did the court obtain jurisdiction of the principal contractor? Such matters involved important facts in issue and disputed questions of law vital to the ultimate question to be solved—that of whether, as a matter of law, respondent was entitled to a lien. How the court decided any of them, with one exception, we are entirely unable to determine. The finding to the effect that if respondent had a lien it was only for a part of his claim, and that it was impracticable from the evidence to separate the lienable from the nonlienable matters, of course, was sufficient to defeat the lien. So was the finding that plaintiff failed to show when the last lienable work was done, maintaining the allegation of the complaint as to the lien being filed in time, fatal to his case. That was a result easy to reach if the evidence warranted the findings.

Whether the findings are sustained by the evidence admits of serious doubt. If they are, whether they would not have been different had the court been less strict in ruling on objections to evidence and applied those liberal rules that are ordinarily and properly applied, especially in the trial of equity

cases, also admits of grave doubt. The purpose of a judicial trial of causes is to administer justice. That should never be lost sight of. Mere technical knowledge is of secondary importance and an effort to effectively display it may prove fatal. If in the end, so far as practicable by human agencies, and with the due observance of established rules, justice does not prevail, the court will have failed to perform its function. Parties should be permitted all reasonable latitude to present their case—a latitude limited only by those boundaries which cannot be crossed without the commission of prejudicial error, so far as careful attention to [81] the trial can determine the same, in the presentation of their cause of action or defense. In a trial in equity they are entitled to a decision by the trial court upon each material issue raised by the pleadings; and to such decision also in detail, to at least a reasonable degree, covering the matters not only deemed by the court material to sustain the final judgment, but all those matters as to which there is a reasonable controversy respecting whether they have a material bearing upon the rights of the parties or not. They are also entitled to the decision of the trial judge specifically upon the minor questions of law applicable to the facts found upon which the ultimate conclusion of law must rest. They are entitled to all that from the one who has the opportunity of hearing the evidence and of seeing the witnesses before he surrenders his jurisdiction over the case. That privilege is given or declared by statute in mandatory language in these words: "The judge shall state in his decision separately: 1. The facts found by him; and 2. His conclusions of law thereon": Stats. 1898, sec. 2863. That means, manifestly, something more than a general finding of facts and a general conclusion of law. As to the facts it means at least a finding in detail of matters essential to be stated in the pleadings to make out the cause of action or defense found by the trial court to exist. It means what it says, and nothing short of the specific findings and conclusions commanded satisfies the full measure of duty according to the standard set by legislative will. That, so far as courts can bow to it without sacrifice of constitutional function, should not be violated.

Failure to make findings and conclusions as above indicated does not constitute reversible error. That has been too often said to be now disturbed: Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352; Luthe v. Farmers' Mut. F. Ins. Co., 55 Wis. 543, 13 N. W. 490; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W.

527; Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500; Yahr v. Joint School Dist., 99 Wis. 281, [82] 74 N. W. 779. But judgments have been so commonly sustained, regardless of defective findings and conclusions, it is feared that in some jurisdictions, and possibly not without reason, the idea prevails that what the legislature saw fit to make a significant part of the code is regarded here to be of trifling importance. We have striking proof of that in the case before us, in that there is an entire absence of any special decision upon most of the contested questions of fact and of law. The issue as to whether the notice of the plaintiff's claim to the proprietor was sufficient to satisfy the statute is treated by embodying the notice in the findings without any decision as to whether respondent was right or wrong in his position that the claim was fatally defective. The same is true as to the lien petition, the affidavit for the order of publication and the order of publication. The issue as to whether the work done by plaintiff was of a lienable character under any circumstances, and that as to whether he was a subcontractor or a mere employé, were treated by embodying in the findings the undisputed evidence as to the terms of the contract, without any specific decision, nor any at all so far as we can discover definitely, as to the proper conclusion of fact or of law to be drawn from such evidence. To place upon file a document as a basis for a final decree embodying a mass of evidentiary matters, with few or no findings upon the issues between the parties, but with a general conclusion as to who is entitled to recover, we can hardly dignify as an attempt to comply with the statute. It should be understood that failure to comply with the statute is error; that it is held not reversible error merely because, in harmony with section 2829 of the Statutes of 1898, this court feels bound to hold that, regardless of how numerous and inexcusable the errors committed upon the trial of a case may be, the judgment must be affirmed on appeal unless it appears probable that the substantial rights of the unsuccessful party may thereby have been injuriously affected: Mauch v. Hartford, 112 Wis. 40, 87 N. W. [83] 816. What this court is bound to overlook in reaching a final result should not be regarded by trial courts as not error at all, or error of such trifling consequence as to be looked upon as of an extremely technical nature—mere fault in matter of form. Otherwise the result will be that the statute, intended to enable litigants to see the precise grounds upon which their case turned and the unsuccessful party to present his complaints

for review here with as little expense and labor as practicable, and this court to fulfill its function in the matter with the benefit of a definite decision by the trial judge, made from his place of advantage, upon every point involved, will fail to effect those valuable results. This case is such a striking example of a bad practice, that it is deemed best not to let the occasion pass without making a reasonably vigorous attempt to give such significance to the statutory duty to which we have referred as will result in that part of the code creating it being given its proper place in the administration of justice.

As we have indicated it is not entirely clear that the evidence supports the two infirmities as regards facts in issue in the plaintiff's case, found by the court. But it is not necessary to decide the matter, nor does it seem advisable to do so, nor any of the questions presented in the case except that of whether appellant was an employé of the Engineering Contract Company. The view we have come to on that is so obviously fatal to appellant's claim for a lien that we will let our decision rest solely on our conclusion in respect to it.

Sections 3314 and 3315 of the Statutes of 1898 give a lien to a principal contractor, subcontractor, or employé of either, "who performs any work or labor," etc., "for, in or about the erection or construction" of such structures and improvements as those involved in this case. At the outset we must not overlook the significance of the terms "principal contractor," "subcontractor," or "employé of either," used in such a way as to unmistakably indicate a legislative purpose to favor [84] three distinct classes of persons by the statutory privilege. That precludes us from speculating as to whether a "subcontractor," in the broadest sense of the term, can be classed as an employé under any circumstances. So we reach the question at once of whether appellant was an employé or a subcontractor. Within the meaning of the statute he could not have been both. If he was the latter he was a subcontractor of a subcontractor, and not within the statute.

As indicated in the statement of facts, appellant's contract did not bind him to personal service in any proper sense. It bound him to produce upon the ground of the power company, so far as the service of transporting from points several miles therefrom was concerned, a large amount of material to be used in making the improvements under the principal contract. He was at liberty to do that with his own teams or with hired teams, and with the necessary labor to attend the same. Many

teams and servants were required to produce the result agreed upon.

Much significance appears to be attached by appellant's counsel to the fact that the plaintiff's servants acted more or less under the direction of the managing agent for the subcontractor, the Engineering Contract Company; that such superintendent gave orders to the man in general charge of appellant's force of servants, and directed the teamsters where to unload material. We see nothing in that out of harmony with appellant's being himself a contractor. Though his teamsters directly or indirectly followed the suggestions of the manager for the Engineering Contract Company, they were, of course, his employés—men used by and responsible to him in working out the result which he was under contract to produce. Obviously, the mere fact that employés of a person, having a distinct portion of contract work to do, take directions to some extent as the work proceeds from the principal contractor does not change the status of their employer from that of a subcontractor to that of an employé of the [85] principal contractor. The circumstance in regard to who directed the teamsters where to unload material from their wagons has nothing to do with the question of whether their employer was an employé or a subcontractor. That must be determined by the nature of his contract itself.

Now, there can be no question as to what constitutes a principal contractor. He is a person standing in direct relation to the proprietor and responsible to him, permitted, by the nature of his contract, ordinarily, to work out the plan thereof by subletting to others if he sees fit. A subcontractor, then, must be a person whose relation to the principal contractor is substantially the same as to a part of the work as the latter's relation is to the proprietor. He takes some distinct part of the work in such a way that he does not contemplate doing merely personal service. Those whom he employs are his servants. With their aid or without it, and by such means as he deems best for the interests within the lines of the contract, he is obligated to produce the agreed result. The same rule holds good, of course, between him and his subcontractor. The distinguishing feature between the relation of employé and employer and that of contractor and subcontractor is the same whether the subcontractor is removed two or any number of degrees from the person who in the end is to become possessed of the results of the energy employed. While a contractor in

any degree is obligated to deliver certain results, so to speak, the employé is obligated to deliver his personal service. That seems in harmony with the common meaning of the words. Unless there is something in the manner of their use in the statute or in the application thereof to the subject matter with which it deals to indicate to the contrary, that meaning must be deemed to be the one intended by the legislature. Neither of those reasons exists in this case for departing from the common specific meaning of the words. On the contrary, they are used in the statute in such a way as to emphasize such meaning. We are [86] precluded by a well-known rule from looking at them in their broad, general sense so far as that would permit the meaning of one to overlap that of the other, from the fact that each is used, as we have before seen, as descriptive of a specific class.

"Words will be interpreted with unusual extent of meaning and held to be generic rather than specific, and thus made to cover things which are collateral rather than identical, if the certain meaning of the parties and the obvious justice of the case require this extent of signification": 2 Parsons on Contracts, 8th ed., 496.

Applying what has been said, we must conclude that our duty ends here when we declare the common, ordinary meaning of the word "employé" and the word "subcontractor" and determine the status of appellant thereby. That being the case, we might stop at this point, as we have indicated that but one conclusion can be reached. But the matter has been presented with so much earnestness upon both sides and is so vital to the case that we will briefly support the views already expressed.

There is, perhaps, no better way to demonstrate what is the common signification of a word, the customary use thereof, than to consult standard dictionaries. Adjudged cases where the word under consideration was used in the same relation as in the case in hand are of greater weight than mere lexical definitions; but it is not common to find such identity of expression and identity of relation as to leave no reasonable doubt that in both instances the words were used in exactly the same sense. Webster defines "employé" as one who is employed; and "contractor" as one who contracts to do anything. Those definitions are very general, but they obviously suggest, applied specifically, that an employé is one who is employed to perform personal service, and a contractor one who engages to do a particular thing, the idea of personal service not being a

necessary element in the bargain. In the Standard Dictionary it is said an employé is a person who is employed; one who works for wages or a salary [87] or who is engaged in the service of another; a contractor is one who executes plans under a contract; a subcontractor is one who contracts with a principal contractor to do work embraced in the latter's contract—that is, obviously, one who contracts to execute some integral part of the work covered by the scheme of the principal contract. By the Century Dictionary we are informed that an employé is one who works for an employer; a person working for a salary or wages, usually clerks, workmen, laborers, etc.; that a contractor is one who contracts to furnish supplies or to construct work or erect buildings, or perform any work or service at a certain price or rate; that a subcontractor is one who takes a part or whole of the work from the principal contractor. Thus it will be seen, without any extended analysis of the various lexical definitions, that the significant element in the relation of an employé and his employer, specifically considered, is personal service; while the significant element in such relation between a contractor and his principal is the work of an entirety to be performed by him.

Now a short review of the authorities and we are done. Counsel cites to our attention several. All of them that touch the question at all support rather than weaken what has been said. A note in 24 American and English Encyclopedia of Law, first edition, 140, containing this language, is cited: "A subcontractor" is "one who takes from the principal contractor a specific part of the work," covered by the latter's agreement. That serves the author to support this text: A subcontractor is "one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance." The note is based on Farmers' etc. Co. v. Canada R. R. Co., 127 Ind. 250, 26 N. E. 784. It was claimed there that the term "laborer" should be deemed to be included in "subcontractors." The court held otherwise, using substantially the quoted language. The gist of the decision is that a laborer is one who furnishes his personal service, [88] of a grade commonly performed by persons working by the day, while a subcontractor is one who agrees to do a particular act covered by a superior contract. That is against, rather than in favor of, appellant's position. There is no distinction between the term "laborer" and the term "employé" as regards the element of personal service. Commonly understood, the

latter is broader than the former in that it includes persons in a higher degree of employment. That is the result of what is said in Watson v. Watson Mfg. Co., 30 N. J. Eq. 588, and Gurney v. Atlantic etc. Ry. Co., 58 N. Y. 358, cited by appellant's counsel. What is said there by no means supports the idea that an employé is nearer the status of a subcontractor than a laborer. The use which appellant's counsel makes of the decisions indicates a misconception of their purport. They are, when rightly considered, as decisive as a case in one court can be in another jurisdiction, that an employé is not a subcontractor under a statute conferring a lien privilege upon two distinct classes of persons, one called subcontractors and the other employés. In Balch v. New York etc. R. R. Co., 46 N. Y. 521, it was said that the term "laborer" cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work whether with or without his own services, but that such a person is properly described as a contractor. Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. Rep. 60, cited by respondent's counsel, probably gives the distinguishing characteristic between a contractor and an employé, the language used by Mr. Justice Wood of the circuit court being quoted with approval, thus:

"It seems clear to us that Vane was a contractor with the company, not an employé within the meaning of the statute. We think the distinction pointed out by the circuit court is a sound one, namely, that to be an employé within the meaning of the statute, Vane 'must have been a servant, bound in some degree, at least, to the duties of a servant, and not,' as he was, 'a mere contractor, bound only to produce or cause to be so produced a certain result—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party.' "

That has been cited many times in the federal courts. A significant instance is Frick Co. v. Norfolk etc. R. R. Co., 86 Fed. 725, 32 C. C. A. 31, where the term "laborer" was treated as synonymous, except as to mere grade of service, with "employé," and it was held that a person employed by a contractor of electric construction work, to construct the overhead line and string the feed wire at an agreed price per foot, was a subcontractor. Tod v. Kentucky etc. R. R. Co., 52 Fed. 241, 3 C. C. A. 60, is to the same effect. There a person who agreed to supply labor of others and teams at a certain price per day was

said to be a contractor notwithstanding his relations to his employer were such that he was no bound to any particular length of service. The same was held in Cochran v. Swann, 53 Ga. 39. A person who, by contract, got out cross-ties by the employment of other persons, was denied the privilege of a statute giving a lien to laborers upon the ground that he was a contractor. To the same effect is Avery v. Ionia Co., 71 Mich. 538, 39 N. W. 742.

From the foregoing it will be readily seen that appellant cannot reasonably be classed as an employé in respect to the work he contracted to do. He was as free to perform his contract by the employment of others as the principal was to perform his contract that way. The element of personal service essential to the relation of a servant to his master or a laborer to his employer was entirely wanting. Appellant was clearly a subcontractor in the second degree. The privilege of the lien statute does not extend to him.

By the Court. The judgment appealed from is affirmed.

That Contractors are not laborers within the meaning of statutes giving to laborers a right to a lien upon the property of their employers for their wages, see the monographic note to Oliver v. Macon Hardware Co., 58 Am. St. Rep. 308. As to the difference between a contractor and a materialman, see Bennett v. Davis, 113 Cal. 337, 54 Am. St. Rep. 354, 45 Pac. 684. A materialman who furnishes another materialman with materials is not entitled to a lien therefor under a statute giving a lien for labor performed or material furnished "under contract with the owner, contractor, subcontractor, architect, or authorized agent": Hightower v. Bailey, 108 Ky. 198, 94 Am. St. Rep. 350, 56 S. W. 147.

THORNTON v. STATE.

[117 Wis. 338, 93 N. W. 1107.]

CRIMINAL LAW—Construction of Rule Against Compelling One to Bear Witness Against Himself.—Courts should liberally construe the constitutional provision against compelling an accused to be a witness against himself, and refuse to permit any first or doubtful steps which may invade his rights in any respect. (p. 926.)

CONSTITUTIONAL LAW—Unreasonable Search and Seizure. A Search of a Prisoner upon His Arrest is not within the unreasonable searches and seizures prohibited by the constitution of the United States and of Wisconsin, and the fruits of such search are admissible in evidence against him. (pp. 930, 931.)

CONSTITUTIONAL LAW—Compelling an Accused to Bear Witness Against Himself.—It is not the forcing of a prisoner to be

a witness against himself to require him to give a witness in or out of court an opportunity to observe such portions of his person or attire as are customarily open to observation. (p. 931.)

CONSTITUTIONAL LAW—Compelling Person to be a Witness Against Himself—Unreasonable Search and Seizure.—One accused of crime may be compelled to surrender his shoe for the purpose of permitting it to be compared with tracks found in the snow near the place where the crime was committed, and witnesses may be allowed to testify as to the result of such comparison. (p. 931.)

EVIDENCE—Hearsay.—A statement of an accused when he came home, in response to a question what time it was, is not admissible in evidence in his favor. (p. 932.)

EVIDENCE—Prior Arrest.—The reception in evidence of the fact that the accused had been arrested before is not prejudicial error when it is at once followed by other evidence showing for what the arrest was and that he was convicted. (p. 932.)

CRIMINAL LAW—Previous Conviction of the Accused, Admissibility of.—The previous conviction of the accused of an offense may be shown and considered as affecting his credibility as a witness in his own behalf. (pp. 932, 933.)

Prosecution and conviction of an assault to commit rape. The testimony of the prosecuting witness to the commission of the offense was positive. The defense attempted to prove an alibi. To confirm the evidence of the prosecuting witness the shoe of the accused was taken after his arrest and compared with tracks in the snow at the place of the assault.

C. E. Armin, for the plaintiff in error.

Attorney general and Walter D. Corrigan, second assistant attorney general, for the defendant in error.

340 DODGE, J. 1. The first error assigned is upon admitting evidence of comparison with the tracks left in the snow near the place of the assault of the shoe of the accused, which he gave to the deputy sheriff upon request after his arrest. The objection urged is that thereby results an invasion of personal rights guaranteed by two clauses of our constitution, namely, section 8, article 1: No person "shall be compelled in any criminal case to be a witness against himself"; and section 11, article 1: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." The constitutional restrictions are but the expression of the unwritten common-law rights which had come to be recognized in England in revolt against the thumbscrew and the rack of early days. The exact origin of their full establishment is said to be uncertain, but that they had become so established is beyond doubt. Perhaps their ear-

liest complete expression, at least the most satisfactory one, is to be found in the opinion of Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1030. The subject is discussed at large in Boyd v. United States, 116 U. S. 616, 627, 6 Sup. Ct. Rep. 524, Brown v. Walker, 161 U. S. 591, 596, 16 Sup. Ct. Rep. 644, and Bram v. United States, 168 U. S. 532, 545, 18 Sup. Ct. Rep. 183. This rule and practice of the common law was crystallized and expressed in the fifth amendment to the constitution of the United States in words identical with those above quoted from section 8, article 1, of our own constitution. The [341] meaning and force of that expression was early discussed by Chief Justice Marshall upon the trial of Aaron Burr, 1 Burr's Tr. 245, in which he said: "It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself, and to a very effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom, he is safe, but draw it thence and he is exposed to a prosecution. The rule that declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

Thenceforward it has become established by almost unanimous concurrence of opinion that the rights intended to be protected by this constitutional provision are so sacred, and the pressure so great toward their relaxation in case where suspicion of guilt is strong and evidence obscure, that it is the duty of the courts to liberally construe the prohibition in favor of private rights, and to refuse to permit those first and doubtful steps which may invade it in any respect: Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. Rep. 524; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 195; Bram v. United States, 168 U. S. 532, 18 Sup. Ct. Rep. 183; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; People v. Forbes, 143 N. Y. 219, 38 N. E. 303; State v. Height, 117 Iowa, 650, 94 Am. St. Rep. 323, 91 N. W. 935. In pursuance of this policy of construction, it has become fully established that the prohibition against one's being compelled to be a witness against himself should not be limited to exclusion of merely oral statements against himself; that if the link in the evidence, which, under the language of Chief Justice Marshall, he could not be required to furnish, was to be

furnished by some fact, document, or property which he had a right to hold secret, the mantle cast about him by the constitution was as much rent by requiring him to disclose [342] that secret fact otherwise, as by word of mouth. One of the latest cases, presenting an exhaustive and well-reasoned opinion on the subject, by McClain, J., is State v. Height, 117 Iowa, 650, 94 Am. St. Rep. 323, 91 N. W. 935, where one charged with rape was required to submit to a medical examination to ascertain the fact that he was suffering from a venereal disease, such as the prosecuting witness found herself afflicted with a short time after the alleged crime. It was there held that the rule of the common law—Iowa having no express constitutional inhibition like ours—prohibited compulsion to disclose this fact, constituting, as it did, a link in a chain of circumstantial evidence which might lead to his conviction. A similar case in principle is People v. McCoy, 45 How. Pr. 216, where a woman charged with infanticide was required to submit to a physical examination which enabled physicians to testify that she apparently had recently been pregnant and delivered of a child. This was held to be in violation of the spirit and meaning of the constitutional inhibition declaring that no person shall be compelled in any criminal case to be a witness against himself. The court said: "They might as well have sworn the witness, and compelled her, by threats, to testify that she had been pregnant and been delivered of the child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child."

While, however, the constitution, in perpetuation of the rules of the common law, must be held to protect one from being compelled to disclose any criminatory fact, either by words or by surrender of papers, documents, or other effects, which, in the nature of things, he has a right to keep secret, it cannot be held to exclude those sources of evidence which have always been recognized as legitimate. Because a fact pertains to or is connected with the person of an accused, it is not necessarily secret. Of course, the personal appearance of one, his obvious physical characteristics and his attire, are [343] things usually open to observation by others, and from time immemorial testimony by those who have observed them has been received and has been considered in no wise to invade the privacy of the person observed. How far these opportunities for observation may be coerced when one is in custody has been the subject of

discussion under many aspects. That a man's head is bald is a fact ordinarily observed and known by many who come in contact with him. Does it not thereby cease to be one of those private, secret facts which it is an invasion of his right to have observed against his will? May he not, when in custody, be required to remove his hat and thus give the opportunity of observation which has commonly existed for those coming in contact with him? It seems that this must be so. There are, of course, extreme cases in both directions about which courts would hardly doubt. Those mentioned from New York and Iowa above, of medical examination, in one case to ascertain the fact of recent pregnancy and parturition, in the other of recent venereal disease, are far to the one extreme. The illustrations of the removal of the hat, or removal of a veil for opportunity to observe the face, are perhaps as extreme in the other direction. In line, however, with such illustrations, are the many cases where an accused present in court has been held properly required to stand up to facilitate a witness in identifying him, or to enable observation of some obvious fact in his appearance: State v. Johnson, 67 N. C. 55; People v. Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003; Commonwealth v. Whitman, 121 Mass. 361; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Blackwell v. State, 67 Ga. 76, 44 Am. Rep. 717; Rex v. Watson (1817), 2 Stark. 116; Rex v. Deering, 5 Car. & P. 165. In State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1, one charged with murder had said that the deceased was accidentally burned to death, and that she had burned her hand in trying to put the fire out. Her hand being wrapped up, she was compelled, against her protest, by the coroner, to unwrap the hand, and evidence that [344] it showed no signs of burning was held admissible on the trial. In State v. Prudhomme, 25 La. Ann. 522, it was held permissible to require accused to take his feet from under a chair, thus enabling a witness who had seen tracks of the murderer to state how the prisoner's feet corresponded therewith. The most extreme case in this direction is State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530, where, the identity of accused being disputed, he was required to bare his arm to disclose certain tattooing. Whether the act itself were permissible or not, the reasoning of the court sustaining it is so complete a departure from the principles laid down by the general line of authorities that we should not be inclined to accept it. The court, in order to distinguish such cases as the infanticide case in 45 How. Pr. 216, intimates that

any examination or exposure of the body which is indecent might be excluded on that ground, independently of the constitution. A more justifiable test of the limits of this field of inspection of the person of an accused is suggested in State v. Nordstrom, 7 Wash. 506, 510, 35 Pac. 382, where it is said: "It is generally held that an accused person cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of his identification, or in other ways affording evidence against him."

A distinction has been marked in some cases between enforced inspection by another to enable the latter to testify, and the actual exhibition of the accused to the jury as substantive proof of some fact—a distinction only remotely relevant here: See State v. Jacobs, 5 Jones (N. C.), 259; State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1; and note to People v. Gardner, 28 L. R. A. 699 (144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003).

Another line of cases deals with the compulsory comparison of footprints, where the accused has been required, either in or out of court, to make such footprints, in order that those who had observed the vicinity of the crime might make comparison. This was held to be a requiring of him to give testimony, [345] and therefore an invasion of his constitutional right, in Day v. State, 63 Ga. 667; Stokes v. State, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72. But the exact contrary was held in State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595.

There is also another line of cases which it seems to us have a most direct bearing upon the situation. These relate to the use as criminating evidence of those articles which are found upon the person of the accused when arrested; being taken from him, of course, by virtue of the physical power which the arresting and incarcerating officers have over him, and therefore presumptively without his consent. Those cases are very numerous, and but few need be cited to illustrate the principle. In Dozier v. State, 107 Ga. 708, 33 S. E. 418, the fact that the sheriff found and took from the pocket of the prisoner a pistol was allowed to be proved as evidence on a charge of carrying concealed weapons. In Bryant v. State, 18 Tex. App. 107, one accused of murder was required to remove his overshirt, whereby the sheriff was enabled to discover blood spots upon his undershirt, of which fact he gave testimony and produced the undershirt in evidence before the jury. The hold-

ing that it was admissible was perhaps obiter, inasmuch as it was first held that proper objection had not been reserved. In State v. Nordstrom, 7 Wash. 506, 35 Pac. 382, boots and socks taken off from the prisoner at the time of his arrest were held admissible, the court saying: "It has never been held that personal effects of every kind could not be taken from the person of a prisoner and used upon his trial for what they may be worth as criminating evidence."

In People v. Connor, 9 N. Y. Supp. 674, 679,58 Hun, 644, an arresting officer was permitted to testify to condition of the underclothing of one accused of rape, ascertained by police search of his person on arrest. In State v. Graham, 74 N. C. 646, 21 Am. Rep. 493, it was said: "An officer who arrests a prisoner has a right to take any property which he has about him which is connected with [346] the crime charged, or which may be required as evidence"; basing the statement on several English authorities. The same idea is reiterated in People v. Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741, 38 N. E. 1003; and in State v. Height, 117 Iowa, 650, 94 Am. St. Rep. 323, 91 N. W. 935, it is said:

"There are, of course, limitations as to immunity from search and seizure for the purpose of securing evidence of crime. It is well settled that, when one charged with an offense is arrested, the officers may, without further legal procedure, seize weapons with which the crime has been committed, property which has been obtained by means of a criminal act, or articles which may give a clue to the commission of the crime or identification of the criminal. . . . . And the officer making such search may testify as to any facts, even though criminating, which were discovered thereby."

In Best on Evidence, section 201, numerous instances are given of the use of what is called "real" evidence, resulting from search of the person of the accused after his arrest; as by comparing a portion of a knife blade left in a burglarized window with a knife in the pocket of the accused; comparison of the paper wadding found in a wound with a torn printed paper in the prisoner's pocket.

It seems to us plain, without deciding the exact location of the dividing line between what is proper and what is improper in this very broad field, that the evidence now complained of falls clearly and safely within the principle of the cases last referred to. Not only in this country ever since the adoption of the constitution, but in England long before, it has been

usual, upon the arrest of the prisoner, to subject him to a search. This is done as well for purpose of safety of custody and incarceration, to ascertain the presence of weapons or implements of escape, as for purposes of discovery. It had become so entirely well established as not an infringement of legitimate personal rights before our constitution was adopted, and has been so universally treated since, and it must be assumed not to have been within the class of unreasonable searches and seizures which the fourth amendment [347] to the constitution of the United States prohibited, in language later adopted into our own constitution. The fruits of such customary and not unreasonable search fall within the principle enunciated in State v. Nordstrom, 7 Wash. 506, 35 Pac. 382, and which we adopt as an approximate guide upon such subject, namely, that such portions of the person or attire of an accused as are customarily open to observation are legitimate sources from which witnesses may give testimony of the result of such observation, and that it is not a forcing of a prisoner to be a witness against himself to require him to give to witnesses, in court or out of court an opportunity to make such observation. Within this rule it would have been entirely competent for the sheriff or anyone else to have noticed the shoes of the plaintiff in error, and to have testified, so far as he was able, to a comparison between them and the footprints near the place of the assault. Now, if, without breach of the prohibition against unreasonable searches and seizures, these shoes might come into the possession of the sheriff or anyone else, how can it be said that the constitutional rights are any more invaded because the witness uses them at the place of the crime to make a careful and useful comparison, and testifies to the result? The only difference is that the evidence thus becomes much more certain and valuable. We are satisfied that the required surrender of defendant's shoe did not constitute any unreasonable search or seizure, and that the form and outlines of one's shoe are not so naturally secret that the enforcing opportunity to observe them requires of the accused a disclosure of a fact which he has any right to withhold, so as to constitute any infringement of the constitutional command that he be not compelled to be a witness against himself; hence that the assignment of error in question cannot be sustained.

2. A further error is assigned upon the conclusion of the testimony of defendant's mother, who, having testified that she

was in bed when he came in, and having been asked what [348] time it was, and it appearing that she did not herself look at any timepiece, was asked: "What other conversation did you have with your son?" to which objection was sustained; and was then asked: "What time did he come home?" answered: "I asked him what time it was." (Objected to, and objection sustained.) Clearly no error existed in these rulings. It was an attempt to prove the time of defendant's arrival at home by his own unsworn statement to someone else; hearsay and inadmissible.

Another criticism is made upon the overruling of objection to the question, "You have been arrested before?" answered: "Yes, sir." This was followed at once by the further question, "You were convicted in this court on the thirteenth day of May last for drunkenness?" to which he answered: "Yes, sir." While, of course, the inquiry whether defendant had been previously arrested, if it stood alone, was error, there could be nothing prejudicial in the establishment of that fact in immediate connection with the fact of his conviction, which itself was admissible as bearing upon his credibility. The fact of conviction, of course, carries with it the unavoidable inference of previous arrest, and, while it was needless to preface proof of his conviction by proof of the arrest, he could not be prejudiced thereby.

Complaint is made, in this same connection, of an instruction to the effect that the testimony as to the prior conviction was admitted for the sole purpose of impeaching or discrediting the credibility of the defendant as a witness in his own behalf, and was to be considered for no other purpose. We do not very clearly understand the grounds of objection. The instruction is a correct statement of the rules of law under which such testimony was admitted, and was for the benefit of the defendant, cautioning the jury that such fact must not be taken into account as bearing upon the probability of his having committed the offense for which he was being tried. Counsel seems to argue that some milder form of expression [349] ought to have been adopted, because the prior offense was only intoxication instead of some more serious crime. He does not suggest what modification could have been made, and he requested no qualification of the charge. The proposition that a previous conviction of an offense may be shown and considered as affecting the credibility of the defendant when he testifies as a witness in his own behalf is fully sanctioned by all the authorities, and

none cited indicate that the vehemence with which that proposition should be expressed to the jury is to be varied according to the gravity of the previous offense. We cannot consider that there was any error in giving this correct rule of law to the jury.

3. The assignment of error presumably raising the question of the sufficiency of the evidence to support the verdict cannot be sustained. The evidence of the prosecuting witness as to the identity of defendant with the person committing the assault was positive, and, if believed by the jury, sufficient to support their conclusion that it was he who committed the act, notwithstanding evidence from himself that he was then in another part of the town and therefore could not have been the person. The conduct described by the complaining witness was certainly sufficient to justify the belief in the criminal intent charged in the information. We shall content ourselves with this statement, without going into its unsavory details.

We find no error in the record which can require reversal of the conviction.

By the Court. Judgment affirmed.

The Principal Case is cited and considered with other related decisions in the monographic note to State v. Height, 94 Am. St. Rep. 336-347.

HUBER v. MERKEL.

[117 Wis. 355, 93 N. W. 354.]

WATERS, Subterranean.—If Waters Simply Percolate Through the Ground without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume or cut them off with impunity. If, on the other hand, the subterranean waters flow in a definite channel, the rules which govern surface streams apply. (p. 935.)

WATERS, Subterranean, Presumption of Character.—Subterranean Waters are Presumed to be Percolating until they are shown to be supplied by a definite flowing stream. (p. 935.)

WATERS, Subterranean, When Deemed Percolating.—If there is a well-defined area of land within which artesian wells may be successfully drilled and flowing water reached in a stratum of lime or sandstone, but in which, when water is struck, the drill rests upon the bottom of the well and does not make any sudden drop, these facts do not justify the conclusion that there is any definite subterranean stream. On the contrary, the conclusion is irresistible that the waters are percolating. (p. 936.)

EVIDENCE — Judicial Notice — Subterranean Waters. — The courts of Wisconsin take judicial notice that in that state there are now vast subterranean channels or caverns in which subterranean waters flow like a river. (p. 936.)

WATERS, Percolating—Right of Land Owner to Use or Waste. The owner of land has the right to sink a well and to use the water therefrom as he chooses, or allow it to flow away, regardless of the effect of such use upon his neighbors' wells, and such right is not affected by a malicious intent. (p. 939.)

CONSTITUTIONAL LAW—Common-law Rights, When may not be Taken Away.—Where private property rights were founded upon and preserved by any part of the common law in force at the time of the adoption of the constitution of Wisconsin, they cannot be taken away or impaired by mere legislative enactment, but only for public purposes by the exercise of eminent domain or by the exercise of the police power for the protection of the public. (p. 941.)

WATERS.—The Common-law Rules as to the Use and Disposition of Water remain in force in Wisconsin. (pp. 941, 942.)

CONSTITUTIONAL LAW—Water Rights, Legislative Interference with.—The right of a land owner to sink wells and gather and use percolating waters, even though the flow of his neighbors' wells is diminished, is a property right which cannot be taken away or impaired by the legislature, unless by way of the exercise of the right of eminent domain or by the police power. (p. 942.)

CONSTITUTIONAL LAW.—Laws in the Supposed Exercise of the Police Power Interfering with a Citizen's Right of Property can be justified and sustained only upon the ground that they in some manner secure the comfort, safety or welfare of society. (p. 942.)

CONSTITUTIONAL LAW.—Statutes Requiring the Preventing of the Wasting of the Waters of Artesian Wells, as by prohibiting the needless discharge of a greater quantity of water than is reasonably necessary for the use of the owner so as not to diminish the flow of water of other artesian wells in the same vicinity, cannot be sustained as an exercise of the police power. (p. 945.)

Suit to enjoin the defendant from wasting or unreasonably using water from certain artesian wells on his land. The plaintiff was the owner of real estate adjoining and having an elevation of twenty feet higher than the defendant's farm. An artesian well bored on the plaintiff's farm ceased to flow water when two wells were subsequently bored on the defendant's premises. There were many artesian wells in the same vicinity used to supply water for household, domestic and farm purposes. The defendant used the water from his wells to supply a fish-pond and for sale, and allowed the balance to run to waste. The court restrained the defendant from permitting the water to escape from his wells except when in actual use, and required the wells to be so arranged that water would not escape therefrom except when necessary for use in ordinary household and farm purposes. Defendant appealed.

Nath, Pereles & Sons and Charles E. Robinson, for the appellant.

Barney & Kuechenmeister, for the respondent.

[357] WINSLOW, J. The principles of the common law regulating the rights of land owners in subterranean waters are well understood. If the waters simply percolate through the ground, without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume, or cut them off with impunity. If, on the other hand, the subterranean waters flow in a defined channel, the rules which govern the use of surface streams apply; but the presumption is that the waters are percolating waters until it is shown that they are supplied by a definite, flowing stream: Gould on Waters, secs. 280, 281, and cases cited. In the present case the trial court found that the water which supplies the plaintiff's and defendant's wells comes from a "subsurface supply and stream of water," or, as it is called [358] in another place in the findings, "a subterranean stream of water." If, as we assume, this finding means a subterranean stream with defined channel, as distinguished from mere percolations through a porous stratum of earth or rock, then the judgment may be sustained upon this ground alone, if such finding is sufficiently supported by the evidence. This, therefore, is the first question to be considered.

It appears by the evidence that in the town of Germantown, Washington county, there is an area about two and one-half miles in width by five miles in length, within which artesian wells may successfully be drilled and flowing water reached at a depth of about two hundred feet, and in which there are now about twenty-five such wells, including the wells of the parties; that most, if not all, of these wells when first drilled were flowing wells, but that as more wells have been bored the flow of wells located on higher ground (of which the plaintiff's is one) has become irregular, but that water can always be obtained by pumping; that defendant's wells are in the lower part of the basin, and hence will flow when those on higher ground will not; that nearly or quite all the well owners have caps or plugs on their wells, so arranged as to check the flow when the well is not in use, but that the defendant allows the water to flow freely for the greater part of the time; that when one of the wells in the region is allowed to flow continuously no perceptible effect is immediately observed upon the plaintiff's

well, but that after about twenty-four hours of flowing the water begins to recede materially; that when water was struck in defendant's second well the plaintiff's supply began to fall off, and in about three weeks it ceased to flow over the top.

From the testimony of a number of experienced artesian well-drillers in the region, one of whom drilled the wells of the parties to this action, it appeared that in most, if not in all, of the wells, water was obtained either in a stratum of limestone or a stratum of sandstone, and that when water was [359] struck the drill bit rested upon the bottom of the well. There was no evidence that there was any sudden drop of the drill when water was reached.

The foregoing statement covers all the material facts in evidence which tend to throw light upon the sources or nature of the water supply in the Germantown wells. It is impossible for us to see how these facts justify the conclusion that there is any defined subterranean stream which supplies the wells of the parties. The conclusion is irresistible from the facts stated that all the wells draw their supply from a stratum of porous rock, either of limestone or sandstone, which lies in an inclined position and comes to the surface at some distant point, where it receives its water supply; that this porous rock is located between impervious rocks above and below, and probably ends or is cut off at one edge of the Germantown district, thus forming a basin or pocket, which, when pierced by the drill, sends water to the surface in obeyance to natural laws too well known to require statement. Were there any doubt of this conclusion from the evidence, scientific knowledge on the subject of the sources of artesian wells in general, and the artesian wells of Wisconsin in particular, is now so complete and certain as to leave no room for doubt, and of such facts courts may take judicial notice. It has long since become a matter of common scientific knowledge that the ordinary artesian well derives its supply from a pervious stratum of rock imprisoned between two impervious strata of earth or rock, the water-bearing stratum being inclined and coming to the surface at some distant and higher point, called the "intake," where it receives the water, and that the water percolates with greater or less rapidity along and through the inclined stratum, obedient to the law of gravity, until it reaches some obstruction so as to be imprisoned, in which event, if the stratum be pierced, water will rise in a tube by hydrostatic pressure, due to the greater height of the intake. The idea that there are vast subterranean [360] chan-

nels or caverns in which artesian waters flow like a river, has been long since abandoned. These are matters of common scientific knowledge: 1 Geology of Wisconsin (Chamberlin), p. 689; U. S. Geological Survey 1885, pp. 125-173; 6 Iowa Geological Survey, p. 127.

Thus in the present case both the evidence and well-established scientific knowledge agree as to the source of the water supply of the wells in question. That source is not a stream or river with defined channel, but an inclined stratum of porous rock which may be many miles in extent, saturated with water which percolates gradually from the intake along and through the stratum until stopped by the termination of the porous formation, where it forms an accumulation. In no proper sense can such water be called a stream with a defined "channel." The word "defined" here means a contracted and bounded channel: Kinney on Irrigation, sec. 48. It is not meant by this that there must be an open channel or fissure in the rock, through which water flows freely and rapidly, in order that there may be a defined subterranean stream (such channels are rare, if in fact they ever exist), but simply that the water, whether moving slowly or rapidly, and whether passing through sand or gravel or porous rock, must have the characteristics of a stream, in that it has a course and a channel with definite bounds. Such subterranean streams doubtless exist, especially in sandy regions, where surface streams at times disappear and pursue their courses underground for long distances, and finally return to the surface again; but the waters in question in the present case have none of these characteristics, and hence must be held to be strictly percolating waters. An exhaustive discussion of the general subject of the distinction between subterranean streams with defined channels and mere percolating waters will be found in 67 Am. St. Rep. 659, as a note to the case of Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41, and may be consulted with profit.

Counsel for the plaintiff frankly admit that the weight of 361 authority is that the owner of soil may deal with percolating water as he may see fit, but they claim that there are some modifications of the rule applicable to the present case, and the cases cited in support of this contention will be briefly noticed. First among these cases are Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179, and Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. These cases, indeed, reject the principle that a land owner may dispose of percolating water as he chooses, and adopt the principle that the land owner's

right in percolating waters is no greater than his right in running streams; but they stand nearly or quite alone in that position, and it is admitted in the opinion in the first case cited that the great weight of authority is the other way. We cannot follow them, in the face of the well-nigh universal consensus of judicial opinion to the contrary. The cases of Hart v. Jamaica Pond Aqueduct Corp., 133 Mass. 488, and Forbell v. New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, are also relied on as modifying the general rule. In the first of these cases a bill in equity was filed, in which it was charged that the defendant, which was a corporation authorized by law to condemn land to enlarge a pond upon its own land and construct a dam thereon for the purpose of accumulating water in the pond for aqueduct purposes, had condemned for that purpose a parcel of the plaintiff's land, the plaintiff still remaining, however, the owner in fee of the parcel and also of adjoining lands and of valuable water rights and privileges immediately below the land so taken; that the corporation had commenced to sink a well and erect powerful pumping machinery upon the land condemned, for the purpose of supplying water to its customers; and that by these acts the plaintiff's lands and water rights would be seriously impaired in value by the tapping and drawing off of the underground sources of supply of said water rights and privileges. Upon demurrer the bill was held to state a good cause of action. The court said, in substance, that the question was not what [302] might be the rights of the plaintiff as against an owner of adjoining lands, who, by digging wells or by lawful use of his land, intercepts underground currents of water to plaintiff's injury; this may be damnum absque injuria. The defendant is not the owner of adjoining land, but has only an easement therein for certain purposes, the title being in the plaintiff; and its threatened acts are illegal because they exceed its powers, and hence it stands in no better position than a stranger creating a permanent nuisance on the plaintiff's land.

In the second case named it appeared that the city owned two acres of land adjoining certain agricultural lands of the plaintiff, and that it sunk wells and pumped and sold water therefrom, thereby draining the plaintiff's land of its natural water supply, and thereby made it unfit for cultivation and destroyed plaintiff's business. It was held that the rule that the extraction of percolating water was not actionable would be adhereed to, but that where adjoining land is impaired for agricultural purposes an injunction should be granted.

It will be noticed that in each of the above cases the court is careful to recognize the principle that the owner of lands may use percolating waters without liability to an adjoining owner. The Massachusetts case in effect holds that the defendant there was not an owner of land and had no right to use the land in that manner, and hence was liable; while the New York case seems to hold that the extraction of underground percolating waters, which simply affects the flow of such waters, on adjoining lands, is lawful, but if it impairs the land itself for use in agriculture it is wrongful. Whether the reasoning of the latter case is entirely satisfactory or logical may be doubted, but in any event it is plain that neither case in any way touches the case at bar. In the present case the defendant has sunk a well on land which he owns in fee, and there is no claim that it in any way affects the quality of the plaintiff's land for use in agriculture.

[303] Again, the respondent cites the case of Greenleaf v. Francis, 18 Pick. 117, where the principle stated was that a man may lawfully dig a well on his own land where convenient, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by mere malice; and, as recognizing the same principle, the respondent also cites Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352, and Chesley v. King, 74 Me. 164, 43 Am. Rep. 569. This court has recently and distinctly held that the exercise of a property right cannot be affected or curtailed by a malicious motive: Metzger v. Hochrein, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308.

Lastly, in this connection, the respondent cites two cases from Iowa, viz., Burroughs v. Satterlee, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808, and Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, as justifying in some degree the contention made here; but on examination of those cases it will be seen that in both of them it was found as a fact that the conflicting wells tapped an underground defined stream of water, and hence they were properly governed by the law applicable to surface streams.

From this brief review of the law and the cases relied upon as modifying the ancient common-law rule as to percolating waters, it seems clear that it must be held that the appellant had clear right at common law, resulting from his ownership of land, to sink a well thereon, and use the water therefrom as he chose, or allow it to flow away, regardless of the effect of

such use upon his neighbors' wells, and that such right is not affected by malicious intent. Whether this right results from an absolute ownership of the water itself, as stated in some of the authorities, or from a mere right to use and divert the water while percolating through the soil, is a question of no materiality in the present discussion. In either event, it is a property right, arising out of his ownership of the land, and is protected by the common law as such.

The respondent, however, relies upon the provisions of chapter 354 of the Laws of 1901; and it must be admitted that, under [364] the findings of the court, the judgment in this case is justified by the terms of that law. The first section of the law in question provides that: "Where there are two or more artesian wells in any vicinity or neighborhood, one or more of which are operated or used by any person or owner, the person or owner of such well shall use due care and diligence to prevent any loss or waste or unreasonable use of any water therein contained or flowing from the same, as would deprive or necessarily diminish the flow of water in any artesian well, to the injury of the owner of any other well in the same vicinity or neighborhood."

The second section provides that: "Any person who shall needlessly allow or permit any artesian well owned or operated by him to discharge greater quantities of water than is reasonably necessary for the use of such person so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well shall sustain."

The validity of this act is denied by the appellant on the following grounds: 1. That it deprives the owner of property without due process of law; 2. That it is the taking of property for private use and without compensation; and 3. That it is special legislation. On the part of the respondent it is claimed that the legislature has the right to regulate the manner of using water, and that such regulation does not interfere with vested property rights; also that the act is valid as an exercise of police power.

We have seen from the previous discussion in this opinion that the right of a landowner to divert, appropriate, and use percolating waters as he sees fit has always been recognized by the common law as a right of property attached to the ownership of the soil, and enforced as such. In this state,

both by the constitution and judicial decision, it is settled that those parts of the common law which were in force at the time of the adoption of the constitution and were not inconsistent [365] therewith remained in force until changed by the legislature: Const., art. 14, sec. 13; Coburn v. Harvey, 18 Wis. 147. The parts of the common law which were in force at the time of the adoption of the constitution, and which have thus been recognized as remaining in force, were such parts as were reasonably applicable to our situation and government: Coburn v. Harvey, 18 Wis. 147. Where private property rights were founded upon and preserved by any part of the common law so in force, they could not be taken away or impaired by mere legislative enactment, but only for public purposes by the exercise of eminent domain, or by the exercise of the police power for the protection of the public. It is true that in many of the extreme western states and territories, where mining interests are of the first importance, or where the land is arid or semi-arid, on account of deficient rainfall, it has been settled that the common-law rules as to the use of surface streams and subterranean waters do not prevail, and that it is competent for the legislature to provide for the appropriation of surface or subterranean waters for purposes of mining or irrigation; and hence in those states there have grown up, by statute or decision or both, systems of law contravening the rules of the common law as stated in this opinion: Atchison v. Peterson, 20 Wall. 507; Yunker v. Nichols, 1 Colo. 551; Reno Smelting etc. Works v. Stevenson, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. 317; Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442; Kan. Laws 1891, c. 133, p. 223 et seq. These systems, however, are all based fundamentally on the proposition that the common-law rules are not applicable to the conditions prevailing in those territories which are widely different from the conditions which prevail in England or in those parts of this country where the rainfall is normal and irrigation is not recognized as a prime necessity. In this state it has never been recognized that any such exceptional conditions prevail as has been held to be the case in the regions mentioned. Moreover, it has been recognized in a long line [366] of cases, too numerous and familiar to need mentioning, that the common-law rules as to the use and disposition of water have always prevailed. Most of these cases relate to surface streams or surface waters, but

in Case v. Hoffman, 100 Wis. 314, 75 N. W. 945, the rule as to percolating waters was stated as the undoubted law.

So it seems inevitable that, in this state at least, the right of a land owner to sink wells and gather and use percolating waters as he will, even though the flow in his neighbor's well be diminished, is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain or by the police power.

As the law in question is in no sense a condemnation law, the only question remaining is whether it may be sustained as a proper exercise of the police power. The police power is a broad and comprehensive power, by which the rights of an individual, both as to his liberty and his enjoyment of property, may be curtailed in the interest of the public welfare, but it is not easy of accurate definition. Where laws which are supposed to be enacted in the exercise of the police power interfere with the citizens' liberty or rights of property, they can only be justified upon the ground that they in some manner secure the comfort, safety, or welfare of society. It is on this principle that drainage laws are sustained: Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389. And conversely, if it appear from the law itself that its purpose is primarily to benefit private owners, they are condemned: In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288. It must appear that the interests of the public generally require the restriction, and not the interests of private individuals: State v. Kreutzberg, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098.

We find ourselves unable to comprehend how, under these principles, the law in question can be sustained as an exercise of police power. It does not even pretend to conserve [367] any public interest. Upon its face its purpose is to promote the welfare of one citizen by preventing his neighbor from using his own property. We are aware that questions of a somewhat similar nature have arisen with regard to laws preventing the waste of natural gas in Indiana, and have received different treatment: Townsend v. State, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19; State v. Ohio Oil Co. 150 Ind. 21, 49 N. E. 809. The statutes under consideration in these cases were both criminal statutes; the first declaring the use of natural gas in flambeau lights to be wasteful and extravagant and dangerous to the public good, and making

such use a misdemeanor; the second declaring it to be unlawful for any person having possession of any natural gas or oil well to allow the gas or oil to escape into the open air for a longer period than two days after the gas or oil shall have been struck in the well. The first of the cases above cited was a criminal prosecution under the first of the above-named laws. A conviction was affirmed, and it is said in the opinion that it was agreed on both sides that the act was an exercise of the police power of the state. It was further said that the question whether a statute encroaches upon the natural rights of the citizen is a legislative and not a judicial question, and that the courts cannot overthrow it on that ground; also that when the legislature had inquired into the fact, and determined that the burning of natural gas in flambeau lights is waste, that determination is binding on the courts. Upon these premises the result seems easy to reach, but the difficulty is that the courts of this state do not proceed upon the principle that a legislative determination that an act does not encroach upon the rights of a citizen ends the question and prevents the courts from passing upon it. In the second of the cases last cited the action was brought by the attorney general, in behalf of the state, to enjoin the defendant from allowing gas to escape into the open air in violation of the second act named. The complaint was voluminous, and showed that a 365 large portion of the people of the state, and many large manufacturing institutions, were dependent upon natural gas for a fuel supply, and that the state itself and many cities and countries had equipped their public institutions and buildings for the use of such gas; that the supply was such that, if husbanded and protected, it would last for many years and increase the comfort and happiness of the people at large; that the defendant had drilled several wells and permitted large quantities of gas to escape in violation of the law, and threatened to continue such course and to drill other wells and to allow the gas to escape therefrom; that, if allowed to continue in such course, the supply of gas upon which the citizens of the state depended would be diminished and finally destroyed; that the statutory penalties were inadequate; and that the damage would be irreparable. Upon demurrer this complaint was held to state a good cause of action; the ground being taken that the law was not an unwarranted interference with private property, because the gas did not become private property until reduced to possession, and that the

public interest in the supply of natural gas was so great and direct that its waste was a public calamity and amounted to a public nuisance which the state had a right to have abated by injunction. It seems clear that, even if the reasoning of these cases could be fully approved, they do not bear very directly upon the question before us. It does not follow that the court would apply the same rules to subterranean percolating waters, which are constantly being renewed, that it does to natural gas, the supply of which is not being renewed. It is to be noticed, also, that both the laws are framed to protect public rights and interests, and not private rights, and that both judgments are based on the ground of great injury to public comfort, prosperity and welfare. The last case cited was taken to the supreme court of the United States (Ohio Oil Co. v. Indiana, 177 U. S. 190, 22 Sup. Ct. Rep. 576), and the 869 judgment below was affirmed; the reasoning being that the supply of gas in the ground is the common property of all the owners of the surface, and that one of the common owners may rightfully be prevented from wasting the common property to the annihilation of the rights of the remaining owners. However sound this principle may be as applied to natural gas or oil, we have failed to find an authority in the books that holds that percolating waters in the ground are the common property of surface owners. On the other hand, the holdings are unanimous to the effect either that such water is the absolute property of the land owner in whose land it happens to be, or that the right of the land owner to use or divert it while in his land is an absolute right.

Another Indiana case (Manufacturers' Gas etc. Co. v. Indiana etc. Co., 155 Ind. 461, 57 N. E. 912) is instructive on this subject, because it draws a distinction between natural gas and subterranean waters, which, if well founded, deprives all the foregoing cases on the subject of the control of the use of natural gas of any significance as applied to the use of subterranean waters. This was an action in equity by one property owner against another, in which the complaint alleged that the defendant, by pumping and using other artificial devices in its wells, was increasing the natural flow of gas in its wells, and thus greatly diminishing the pressure in the underlying gas reservoir, and that as a result a great body of salt water would enter the gas reservoir and ultimately destroy the plaintiff's wells. This complaint was held to state a good cause of action. In the opinion the court

said that, if gas could be dealt with as subterranean waters, there would be little diffculty in determining the rules by which the rights of land owners should be governed.

"But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which courts apply to questions [370] relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar field."

The court then holds, in substance, that the natural right of land owners in natural gas is simply to use such portion as will by natural laws of flowage rise in their wells and not to increase that flow by artificial means, to the detriment of the flow of others.

Perhaps more time has been spent in reviewing these decisions than is profitable, but the subject is interesting, and we have felt that, owing to the importance of the case before us, they should be given serious consideration. That consideration shows conclusively, as we think, that they have no application to the case of the use of percolating waters. The necessary result of the whole discussion is that the law in question cannot be held to be within the police power, and that it in effect takes private property for private use and without compensation.

By the Court. Judgment reversed, and action remanded with directions to dismiss the complaint.

Percolating Waters which have no known or defined course are said to form part of the realty with the absolute right of use and appropriation by the owner of the land: Willow Creek Irr. Co. v. Michaelson, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943; Miller v. Black Rock Springs Imp. Co., 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27. This right, however, cannot, it is believed, be exercised in an unreasonable, negligent, or malicious manner to the injury of other land owners in the vicinity: Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276. A land owner cannot, with impunity, as seems to be the opinion of the Wisconsin court, in the principal case, wantonly or maliciously waste percolating water to the detriment of his neighbors: Barclay v. Abraham (Iowa), 96 N. W. 1080; Stillwater Water Co. v. Farmer, 89 Minn. 58, 99 Am. St. Rep. 000, 93 N. W. 907. The right to use such water, as is pointed out in the last case, is absolute only when he appropriates it for the benefit and improvement of his own premises, or for his own beneficial use. See, too, Smith v. Brooklyn, 46 N. Y. Supp. 141, 18 App. Div. 340, affirmed in 160 N. Y. 357, 54 N. E. 787. The New York and California courts have held that he cannot unreasonably appropriate it even for the purpose of merchandising it: Forbell v.

New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644; Katz v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 74 Pac. 766. As to what are percolating waters, see the monographic notes to Wheelock v. Jacobs, 67 Am. St. Rep. 663-672; Wheatley v. Baugh, 64 Am. Dec. 721-730; and as to whether the malicious exercise of a legal right is, in general, actionable, see Guethler v. Altman, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; Bordeaux v. Greene, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618.

The Legislature is Competent to prohibit the waste of natural gas: See the monographic note to Booth v. People, 78 Am. St. Rep. 256. And we think it equally competent to forbid the waste of percolating waters. We cannot subscribe to the doctrine of the principal case that the courts and the legislature are powerless to restrain a land owner from wantonly or maliciously wasting water which nature has stored for the use and welfare of the community.

PELTON v. SPIDER LAKE SAWMILL AND LUMBER COMPANY.

[117 Wis. 569, 94 N. W. 293.]

CORPORATIONS.—An Officer of a Corporation has no Power to Execute Accommodation Paper in the Corporate Name in the absence of special authority, and a person receiving such paper, knowing or being charged with knowledge that it is accommodation paper, cannot hold the property. (p. 949.)

NEGOTIABLE INSTRUMENTS—Notice of Accommodation Paper.—One who receives a note for the debt of another which bears the indorsement of a third person or corporation not in the chain of title is charged with the notice that the indorsement is an accommodation indorsement. (p. 949.)

NEGOTIABLE INSTRUMENTS—Accommodation Paper—Question for the Jury.—Though a note indorsed by a corporation shows on its face that the indorsement is not in the chain of title and is presumptively an accommodation indorsement, if there is testimony tending to show a consideration for the indorsement, the question must be submitted to the jury, notwithstanding other evidence to the effect that there was no consideration. (p. 950.)

A. W. Sanborn, for the appellants.

Lamoreux & Shea, for the respondent.

570 WINSLOW, J. This is an action against the defendant (a foreign corporation), as indorser of two promissory notes for one thousand and seventy-four dollars and fifty-eight cents and fourteen hundred and forty-eight dollars and ninety-eight cents, respectively, with interest. The defense was that there was no consideration for the indorsement, and that the plain-

tiffs were not bona fide holders. At the close of the trial a verdict for the defendant was directed, and from judgment thereon the plaintiffs appeal.

Many of the facts were undisputed, and may be stated as follows: The plaintiffs, Pelton and Reid, are partners, and were such in July, 1898, engaged in the manufacture of lumber at Cheboygan, Michigan. At that time the firm of Willoughby & Hathway was engaged in selling lumber on commission, having a yard at Tonawanda, New York. July 13, 1898, Pelton & Reid made a written contract with Willoughby & Hathway by which Pelton & Reid agreed to ship one or more cargoes of lumber to Willoughby & Hathway at Tonawanda, which the second party agreed to sell to customers, and to guarantee payment for all lumber sold, and render monthly statements of sales, accompanied with remittances [571] for all lumber sold during the preceding month, the title to all of the lumber to remain in Pelton & Reid until sold. Other clauses in the contract provided that Willoughby & Hathway should advance the freight and insurance on the lumber, which was to be repaid to them by Pelton & Reid, and were to receive for their services in selling the lumber the sum of one dollar and seventy-five cents per thousand feet; also, that in case Pelton & Reid became dissatisfied or in case Willoughby & Hathway failed to render accounts as agreed, Pelton & Reid should have the right to take possession of the lumber unsold, and all unpaid accounts, and dispose of the remaining lumber. Under this contract, and prior to October 1, 1898, about two million feet of lumber, worth about twenty-four thousand dollars, were received by Willoughby & Hathway at Tonawanda. Up to May, 1899, Willoughby & Hathway had accounted to the plaintiffs in money and notes for about five thousand dollars of the proceeds of this lumber sold.

At Tonawanda a firm known as Calkins & Co. had a lumber-yard adjoining the yard of Willoughby & Hathway, and one J. V. Smeaton was manager of the business. In June, 1898, the defendant corporation was organized by Willoughby & Hathway, Smeaton, and one Ellmaker for the purpose of transacting a lumber business, and of this corporation Ellmaker became president, Smeaton vice-president, and Hathway secretary and treasurer, the active management of the corporation's business being in the hands of Smeaton and Hathway. January 1, 1899, the defendant corporation rented the Willoughby & Hathway yard, then containing from one to two million feet of lumber,

and also rented Calkins & Co.'s yard, containing several million feet of lumber. At this time the intention of the defendant was to transact a commission lumber business in these yards, beginning with the opening of navigation in the spring of 1899. The defendant did not purchase the lumber in the Willoughby & Hathway [572] yard at the time it rented the yard, but made an arrangement with Willoughby & Hathway by which, when that firm sold invoices of lumber, it shipped the lumber sold out of the yard to customers, receiving for its services thirty-five cents per thousand. It appears also that, when the defendant made sales of lumber, it took the same from the Willoughby & Hathway yard, and credited that firm for the lumber so taken, and that the amount so taken between January 1 and May 13, 1899, exceeded thirteen thousand dollars in value. The exact amount of the Pelton & Reid lumber which was in the yard at the time defendant took possession does not appear, but there was testimony tending to show that a considerable quantity of it was there. All the lumber in the yard was closed out by July or August, 1899. Hathway managed the firm business of Willoughby & Hathway, and Hathway and Smeaton together managed defendant's business.

In May, 1899, Willoughby & Hathway sent Pelton & Reid by mail a four months' note for two thousand four hundred and eighty-six dollars and twenty-seven cents, executed by the firm of Humphrey & Holdridge to the order of Willoughby & Hathway, and indorsed by them, and also indorsed in the name of the defendant by Hathway, and Pelton & Reid credited the same to Willoughby & Hathway on their commission account. This note was not produced on the trial. Humphrey & Holdridge was a firm doing business at Honeoye Falls, New York, and the note was purely accommodation paper so far as they were concerned, given to the firm of Willoughby & Hathway; but Pelton & Reid did not know this fact, and supposed the note to be for lumber sold to Humphrey & Holdridge. When this note came due it was not paid, but another accommodation note of Humphrey & Holdridge was mailed by Willoughby & Hathway to plaintiffs, and accepted by them in renewal of the former note. This last note was payable to the order of defendant, and indorsed in defendant's corporate name by Hathway as treasurer, and also by Willoughby [573] & Hathway, and upon its receipt the note of April 29th was surrendered. When this note became due it was renewed by the giving of the two notes in suit, which

were also accommodation notes executed by Humphrey & Holdridge to the order of the defendant, and indorsed in the defendant's name by Hathway as treasurer, and also by Willoughby & Hathway, and due two and three months respectively from date. They have never been paid. Both Hathway and Smeaton were accustomed to indorse commercial paper on behalf of the defendant. Willoughby & Hathway became insolvent prior to June, 1899, and Humphrey & Holdridge failed in the latter part of the same year. The plaintiffs made no investigation or inquiry at any time as to the indorsement of respondent on any of the notes, nor as to consideration therefor, nor as to the authority of Hathway to use the corporate name.

The contention of respondent in the court below was that the indorsement of the notes in suit by defendant was purely an accommodation indorsement, without consideration, which Hathway had no power to make, and that the plaintiffs were not bona fide holders, because they received the paper for the individual debt of Willoughby & Hathway, and were charged with notice that the indorsement of the defendant was without consideration and unauthorized. It is certainly true that an officer of a corporation, in the absence of special authority, has no power to execute accommodation paper in the corporate name, and that a person receiving such paper, either knowing or being charged with knowledge of the fact that it is accommodation paper, cannot hold the corporation. Doubtless, also, when a person receives a note for the debt of another, which bears the indorsement of a third person or corporation not in the chain of title, he is charged with notice that the indorsement is an accommodation indorsement: West St. Louis etc. Bank v. Shawnee County Bank, 95 U. S. 557; [574] Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742.

In the present case it appears that the original note of April 29th, of which the notes in suit were mere renewals, was delivered and received to apply upon the liability of Willoughby & Hathway on their commission contract. It appears by Hathway's own testimony that it was executed by Humphrey & Holdridge as makers, and was payable to the order of Willoughby & Hathway, and that he indorsed the corporate name of the defendant upon it before delivery to the plaintiffs. Thus the note itself showed that the defendant corporation was not in the chain of title, and hence that its indorsement was presumptively an accommodation indorsement for the benefit of Willoughby

& Hathway: 1 Bates on Partnership, sec. 358. If, therefore, the evidence in the case had shown that such indorsement was in fact without consideration, and made only for the accommodation of Willoughby & Hathway, there can be no doubt that the plaintiffs were rightly defeated, because the form of execution of the first note (upon which, manifestly, the entire question depends) was such as, under the principles stated, to give them notice of the character of the indorsement, and hence notice that it was unauthorized, at least unless special authority could be shown. It is true that the testimony of the witness Smeaton tended to show that the defendant corporation received no consideration for the indorsement of the note by Hathway in its name, and that the defendant was never indebted to Willoughby & Hathway nor to the plaintiffs, and, if this testimony stood alone, doubtless the judgment was right; but the witness Hathway testifies directly that the original note was given and indorsed with Smeaton's knowledge, and that it in fact represented Pelton & Reid lumber bought by the defendant of Willoughby & Hathway. We are unable to say that this testimony was not credible. If true, [575] it undoubtedly formed a consideration for the indorsement of the note by the defendant, and the plaintiffs were certainly entitled to have the question as to its truth submitted to the jury.

By the Court. Judgment reversed, and action remanded for a new trial.

The Authority of Officers of a corporation to make or indorse negotiable paper is discussed in Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113, 65 N. E. 136; City Electric St. Ry. Co. v. First Nat. Ex. Bank, 62 Ark. 33, 54 Am. St. Rep. 282, 24 S. W. 89; Africa v. Duluth News Tribune Co., 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019. A corporation cannot lawfully execute or indorse negotiable instruments for accommodation, unless express authority therefor is granted in its charter: See the monographic note to Altoona Second Nat. Bank v. Dunn, 31 Am. St. Rep. 753. Consult, in this connection, Klein v. German Nat. Bank, 69 Ark. 140, 86 Am. St. Rep. 183, 61 S. W. 572. Bona fide ownership of accommodation paper is discussed in Evans v. Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919, and cases cited in the cross-reference note thereto; Second Nat. Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

KELLY v. RUMMERFIELD.

[117 Wis. 620, 94 N. W. 649.]

LANDLORD AND TENANT.—A Cropper is One hired by the landlord to cultivate land, receiving for his compensation a portion of the crops raised. An agreement to farm lands on the shares is a contract of service and not a lease, and the person doing the work is a mere cropper and not a tenant, and has no interest in the land. (p. 952.)

LANDLORD AND TENANT.—A Cropper cannot Convey the Legal Title to his share of the crop to a third person before actual division and appropriation. (p. 953.)

REPLEVIN by a Landlord Against a Cropper.—If a cropper, before any division of the crop, takes away what he claims is his share, the landlord may maintain replevin therefor. (p. 953.)

Replevin to recover a half of a crop of potatoes raised by the defendant on the plaintiff's land. The court found that in 1901 the plaintiff made an agreement with the defendant to furnish seed and the defendant to do the labor necessary to cultivate and harvest a crop of potatoes on plaintiff's land, the crop, when grown, to be divided between them in the field; that the defendant planted the crop and harvested it, and after notifying plaintiff of his intention to do so, divided it in the field, leaving one-half for the plaintiff and taking the other half for himself; that the plaintiff objected to any division of the crop being made, but took and appropriated the half left for him by the defendant. The conclusion of the court was that the plaintiff could not maintain the action of replevin and the defendant was the owner and entitled to the possession of the property seized in the action. Judgment was entered accordingly, from which the plaintiff appealed.

A. W. Shelton, for the appellant.

Samuel S. Miller, for the respondent.

621 CASSODAY, C. J. It is sometimes difficult to determine whether a person who works the land of another on shares is a tenant in common of the crop with the owner of the land or a mere cropper. Much depends upon the wording of the contract between the parties: Lanyon v. Woodward, 55 Wis. 652, 13 N. W. 863; Carrier v. Atwood, 63 Wis. 301, 24 N. W. 82; Wood v. Noack, 84 Wis. 398, 54 N. W. 785; Rowlands 622 v. Voechting, 115 Wis. 352, 91 N. W. 990; Warner v. Abbey, 112 Mass. 355. In the case at bar there is practically no dispute as to the facts.

The plaintiff furnished the land and the seed. The defendant was to plow the ground, plant and care for and harvest the potatoes, and have one-half of what should be raised. After plowing the ground and planting the potatoes, the defendant moved away. Finally, his son in law came and went over the potatoes with a cultivator one way and partly over them the other way. But the potatoes became badly damaged for want of care, and finally the plaintiff got another man to care for the potatoes, and agreed to give him a share of the crop for doing so. The defendant testified to the effect that the plaintiff was to furnish the land and the seed, and that he was to cultivate the ground and have half of the crop, provided he stayed there; and if he did not stay, and no one else would buy, then the plaintiff would buy his share of the potatoes. The trial court manifestly held that the parties were tenants in common of the crop. If such was the relation of the parties, then the decision may be justified: Stats. 1898, sec. 4257; Foley v. Southwestern etc. Co., 94 Wis. 329, 68 N. W. 994; Sullivan v. Sherry, 111 Wis. 476, 87 Am. St. Rep. 890, 87 N. W. 471; Orcutt v. Moore, 134 Mass. 48, 45 Am. Rep. 278. If, on the other hand, the defendant was a mere cropper, then the decision was wrong. The general rule is that:

"The legal possession to the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper being merely that of a servant, and incident to his right and duty of entering the close for the purpose of planting, cultivating, and gathering the crop, it is not the legal possession of premises which usually gives the possessor the title to the produce. He has no property in his share of the crop until the division, which is made by the owner of the land": 8 Am. & Eng. Ency. of Law, 2d ed., 324, 325.

It is there said that: "The term 'cropper' is applied to a person hired by the land owner to cultivate the land, receiving for his compensation a portion of the crop raised": 8 Am. & Eng. Ency. of Law, 2d ed., 324, 325.

[628] So it was said in an early case in Pennsylvania that: "If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass": Fry v. Jones, 2 Rawle, 12.

In a later case in the same state it was held that an "agreement to farm land on shares is a contract of service, and not

of lease, and a person doing the farming is a mere cropper, and not a tenant, and has no interest in the land": Adams v. McKesson, 53 Pa. St. 81, 91 Am. Dec. 183. To the same effect, Steel v. Frick, 56 Pa. St. 172. Thus it was held in North Carolina that: "Where a person agrees to work on the land of another for a share of the crop, the cropper cannot convey a legal title to his share of the crop to a third person before an actual division and appropriation": McNeeley v. Hart, 32 N. C. (10 Ired.) 63, 51 Am. Dec. 377.

To the same effect, Brazier v. Ansley, 33 N. C. (11 Ired.) 12 51 Am. Dec. 408; Harrison v. Ricks, 71 N. C. 11. In this last case it is said: "A cropper has no estate in the land. That remains in the landlord. Consequently, although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop."

That is referred to approvingly in Strain v. Gardner, 61 Wis. 184, 21 N. W. 35. Perhaps it would have been more proper to have used the word "land owner" instead of "landlord." We must hold that defendant was a mere cropper, and that plaintiff remained all the time the legal owner of the whole crop, and hence was entitled to recover in replevin.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff in accordance with this opinion.

CROPPERS.

I. Cropper—What Constitutes.
- **a. Distinction Between Cropper and Tenant.**
- **b. Cropping Contracts.**

II. Cropper's Title to or Interest in Crop.

III. Rights and Remedies of Cropper.

IV. Cotenancy in Crop.

I. Cropper—What Constitutes.

a. Distinction Between Cropper and Tenant.—It is oftentimes quite difficult to determine whether a person who works the land of another on shares is a tenant or a mere cropper. This is a question determinable only by the agreement in each particular case: Johnson v. Hoffman, 53 Mo. 504. It appears from the authorities that the question to be determined in every case of cultivation of land on the shares, when the agreement between the parties is open to more than one construction is, Does the contract give the land owner his share as rent or the occupant his share as compensation for his

labors? If the former, the person working the land is a tenant. If the latter, he is simply a cropper: Williams v. Cleaver, 4 Houst. 453.

In Fry v. Jones, 2 Rawle, 12, it was said that: "A difficulty has existed in relation to this matter, from confounding a cropper with a tenant. If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor." In other words, if the general possession of the land remains in the owner, and such other person simply cultivates it for a share of the produce as compensation for his labor, he is a mere cropper.

The term "cropper" is only properly applied to a person hired by the land owner to cultivate the land, receiving for his compensation a share of the crop, and a contract for cropping gives the cropper no legal possession of the premises, further than a hireling as the legal possession remains in the hirer. In this respect a cropper differs from a tenant: Steel v. Frick, 56 Pa. St. 172. A mere agreement to farm land on the shares is a contract of service, and not of lease, and the person doing the farming is a mere cropper, and not a tenant, and has no interest in the land: Adams v. McKesson, 53 Pa. St. 81, 91 Am. Dec. 183.

The difference between a cropper and a tenant is, that a tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rents, it is he who divides off to the land owner his share, and until such division the right of property and of possession in the whole is his. A cropper has no estate in the land, and although he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the land owner, who must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop. Hence if one rents a farm for a year, the land owner agreeing verbally to furnish teams, feed and seed, while the person working the land agrees to furnish the labor and pay therefor, and give one-half of the crop to the land owner "as rent," he is a tenant, and not a cropper: Harrison v. Ricks, 71 N. C. 7.

A cropper differs from a tenant in that he acquires no estate, has merely a right of action on the contract, and consequently can maintain neither trespass nor ejectment: Denton v. Strickland, 3 Jones, 61. "There is an obvious distinction between a cropper and a tenant. One has possession of the premises, exclusive of the land owner, the other has not. The one has a right for a fixed time, the other has only a right to go on the land to plant, work, and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant. The case of a cropper is rather a mode of paying wages than a tenancy. The title to the crop, subject to the wages is in the owner of the land": Appling v. Odom, 46 Ga. 585. If there is no language in the contract imparting a conveyance

of any interest in the land, but, by its express terms, the general possession of the land is reserved by the owner, the person entitled to work the land becomes a mere cropper, and the relation of master and servant, and not that of landlord and tenant, exists between him and the land owner: Gray v. Robinson (Ariz.), 33 Pac. 712; Haywood v. Rogers, 73 N. C. 320.

One employed to work land on the shares or for a share of the crop is a mere cropper or employé, who may be discharged for cause: Jeter v. Penn. 28 La. Ann. 230, 26 Am. Rep. 98.

b. **Cropping Contracts.**—In any case where the owner of land agrees with another, either as occupant or mere cultivator, to pay the latter as compensation for working the land the value of a certain portion of the crops or a certain share thereof, the occupant or cultivator does not become a tenant of the land owner, and the agreement between them is not to be construed as a lease, but a mere cropping contract. In such case the agreement between the parties does not create the relation, nor the rights and liabilities of landlord and tenant, but simply those of land owner and cropper: Richards v. Wardwell, 82 Me. 343, 19 Atl. 863; State v. Jewell, 34 N. J. L. 259; Bradish v. Schenck, 8 Johns. 151; Caswell v. Distnich, 15 Wend. 379; Wilbur v. Sisson, 53 Barb. 258; Taylor v. Bradley, 4 Abb. App. Dec. 363, 39 N. Y. 129, 100 Am. Dec. 415; Booher v. Stewart, 75 Hun, 214, 27 N. Y. Supp. 114; Denton v. Strickland, 3 Jones, 61; Medlin v. Steele, 75 N. C. 154; Maverick v. Lewis, 3 McCord, 211; Warner v. Hoisington, 42 Vt. 94; Lowe v. Miller, 3 Gratt. 205, 46 Am. Dec. 188; Lanyon v. Woodward, 55 Wis. 652, 13 N. W. 863. Thus, one who raises a crop upon the land of another under a contract to raise such crop for a particular part of it is a mere cropper, and not a tenant; and has a lien upon the crop for whatever is due him: Burgie v. Davis, 34 Ark. 179. A contract with the owner of a farm to cultivate it for a certain period for a certain share of the crop as compensation is not a lease, and does not create the relation of landlord and tenant, although the cultivator occupies the farm buildings while thus employed. Such contract is a mere cropping agreement: Gray v. Reynolds, 67 N. J. L. 169, 50 Atl. 670; and to the same effect is Ferris v. Hoglan, 121 Ala. 240, 25 South. 834. An agreement between a land owner and another that the latter shall plant and raise a crop on part of the former's land, of which the cultivator shall be entitled to one-third, not stipulating as to the duration of the contract, nor the relations of the parties to one another, constitutes the person tilling such land a mere cropper, with a naked right to enter and perform the labor necessary under the provisions of the contract: Moser v. Lower, 48 Mo. App. 85. If one agrees to attend to so much of another's land as he can cultivate with one horse during a year, and pay as "rent" two bales of cotton out of the first picking and no part of the crop to belong to him until the "rent" is paid, he is a mere cropper and not a tenant, as such contract is too indefinite

to constitute a lease, or create the relation of landlord and tenant between the parties: Haywood v. Rogers, 73 N. C. 322. An agreement by which the owner of land agrees to furnish teams, utensils and supplies to make a crop on his land, the crop to be his, but in consideration of the labor of the other party the latter is to have what remains after deducting one-half of the crop for the use of the land, advances, etc., does not create a lease nor the relation of landlord and tenant, but is a mere cropping contract: Hammock v. Creekmore, 48 Ark. 264, 3 S. W. 180; Bryant v. Pugh, 86 Ga. 525, 12 S. E. 927.

II. Cropper's Title to, or Interest in, Crop.

The possession of the cropper of the crop raised by him is only the possession of a servant, and in law remains in the land owner, who must divide off to the cropper his share: Harrison v. Ricks, 71 N. C. 7. The cropper is entitled to his share of the crop only after it is harvested: Lambertson v. Stouffer, 55 Pa. St. 284. The party undertaking the labor under a cropping contract has no exclusive title to any part of the crop raised until it is divided, and the share contracted for by him is set off to him, and before that time he can do no act to prejudice the right or title of his employer, who is the true owner: Hammock v. Creekmore, 48 Ark. 266, 3 S. W. 180. If the owner of a farm employs another to till and carry it on for him, and as compensation allows him one-half of the crop raised, deducting advances and other claims, the exclusive property in the crop remains in the land owner until he has set apart the employé's share: Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142; or if the overseer of a plantation, under an agreement with his employer, is to receive a certain portion of the crop as compensation for his services, he has no exclusive title to such portion until it has been severed and delivered to him by the employer: Rogers v. Collier, 2 Bail. 581, 23 Am. Dec. 153. If one furnishing the land and stock and another furnishing the work agree to divide the crop equally, the latter has exclusive title to his half only after a division of the crop and his half has been set apart to him: Hughes v. Stewart, 74 Ga. 827. If, under a cropping contract for hay grown the land owner's half is to be stacked, and the hay stacked, one-half thereof in each of two yards, and that in one of the yards is selected by the land owner, the division is complete, and the title to the hay so selected is in the land owner: Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537. If one person agrees to work the land of another on shares under a cropping contract, he has no assignable title to his share of the crop before an actual division and appropriation: McNeeley v. Hart, 10 Ired. 63, 51 Am. Dec. 377. The cropper has no such title as will enable him to sell any part of the crop prior to its division, and the purchaser from him obtains no title through such sale: Wentworth v. Miller, 53 Cal. 9; Bryant v. Pugh, 86 Ga. 525, 12 S. E. 927. A cropper has no such

interest in the crop as can be subjected to the payment of his debts while it remains en masse and before division: Brazier v. Ansley, 11 Ired. 12, 51 Am. Dec. 408. A cropper who absconds prior to the division of the crop has no such interest therein as renders it liable for attachment for his debts: Chandler v. Thurston, 10 Pick. 205. If one agrees to work the land of another for a share of the crop without obtaining any ownership therein before division, execution under a judgment against him cannot be levied on the product of the crop before such division: Gray v. Robinson (Ariz.), 33 Pac. 712.

An owner of land who contracts with a cropper that he shall furnish to the latter certain supplies with which to make the crop, and that the share of the cropper shall not be moved from the place until such advances are paid for, has a right to retain such crop until all advances are paid, as against the cropper, and all purchasers or mortgagees from him, subsequent to the date of the contract: Ponder v. Rhea, 32 Ark. 436; Appling v. Odim, 46 Ga. 583. In such case the mortgage made by the cropper upon the crop is effective only as to such share of the crop as remains in him after deducting the share of the land owner and enough to repay all advances made by him: McGee v. Fitzer, 37 Tex. 27.

III. Rights and Remedies of Cropper.

If, after the execution of the cropping contract, the cropper is expelled or prohibited by the act of the land owner from tilling the land or carrying on the farm pursuant to the agreement, against his will and without his consent, it will amount to an eviction for which an action of trespass quare clausum fregit will lie against the land owner, and in which exemplary damages may be recovered if the circumstances attending it are sufficiently aggravated in their character to warrant or require them: Williams v. Cleaver, 4 Houst. 454. After the division of the crop, there being no unsatisfied lien for advances to secure the performance of other stipulations, the land owner is guilty of trespass in forcibly seizing and carrying away the share of the cropper stored in a barn on the premises: Curtis v. Cash, 84 N. C. 41. But the cropper has no estate in the land, he merely has a right of action on the contract, and consequently can maintain neither an action in trespass or ejectment against a third person who enters the premises unlawfully: Bradish v. Schenck, 8 Johns. 151; Decker v. Decker, 17 Hun, 13; Denton v. Strickland, 3 Jones, 61; Fry v. Jones 2 Rawle, 12. A cropper entitled to a share of the grain may maintain trover against the owner of the land who cuts the grain and refuses to deliver up the share of such cropper: Stafford v. Ames, 9 Pa. St. 343. Or if the land owner wrongfully dispossesses the cropper, and himself completes the cultivation of the crop, the cropper may, after the crop is matured, sue for his undivided share and for a division, or if such share cannot be had, for its value: Tignor v. Toney, 13 Tex. Civ. App. 519, 35 S. W. 881. Or where one, having contracted with another to allow him to cultivate a farm on shares for a year, orders

him off the farm before the end of the year, and refuses to let him go on with the contract, and rents the land by written lease to a third person, the cropper may maintain an action at once against the land owner, and recover as damages the value of such cropping contract: Jewett v. Brooks, 134 Mass. 505.

One who raises a crop upon the land of another under a contract to raise the crop for a particular part of it is a mere cropper and not a tenant, and has a lien upon the crop for whatever is due him, and as against him, a laborer under him has a lien on the crop only to the extent of the cropper's claim against the land owner, and may enforce it against the land owner who gets the crop: Burgie v. Davis, 34 Ark. 179. If, under the contract between land owner and cropper, the land owner furnishes the seed, stock, etc., and the cropper the labor, for making a crop, which is to be controlled by the land owner until after advances made by him are paid, and then to be equally divided between them, the cropper is entitled, after the repayment of such advances, to foreclose a special laborer's lien for any balance due him: McElmurray v. Turner, 86 Ga. 215, 12 S. E. 359. A cropper is liable to be discharged for cause, subject to his right to recover such an amount of the crop or its proceeds as is proportioned to the time which he worked upon it: Jeter v. Penn, 28 La. Ann. 230, 26 Am. Rep. 98. After the crop is finally divided, the title to the share set apart to the cropper becomes his, and the land owner has no title thereto which he can recover in trover. If he has any claim for damages, his remedy is to sue therefor: Hughes v. Stewart, 74 Ga. 827. But if the division of the crop is provisional and not final the land owner does not lose title to any of the crop, and may enforce a claim for damages against the cropper against his share of the crop: Bowles v. Bowles, 101 Ga. 837, 29 S. E. 35. If, however, division of the crop is made at the request of the cropper and is final, it vests the title to the land owner's share in him, and, in the absence of agreement reserving or giving to the cropper a lien upon the land owner's share, he can claim no interest therein nor lien thereon, for any payment claimed to be due him from the land owner: Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537. If the land owner by mistake receives more than his share upon division, the cropper may, upon his refusal to deliver the excess, replevy it: Freese v. Arnold, 99 Mich. 13, 57 N. W. 1038. The cropper, however, has no right to make the division of the crop; that right is the land owner's, and if he makes an agreement whereby another is to cultivate the land on the shares, in the absence of any express words indicating a contrary intention, the owner impliedly reserves a share in the crop, which he may take without the cropper's consent: Messinger v. Union Warehouse Co., 39 Or. 546, 65 Pac. 808. A cropper has, of course, a right to go upon the land to plant, work, and gather the crop: Appling v. Odom, 46 Ga. 585. And for the purpose of doing all acts necessary to be done in producing, cultivating, harvesting, or removing and dividing the crop, each of the parties has an

equal right to enter upon the land, and if either forcibly resists the entry of the other, or removes him after such entry, he is guilty of an assault and battery: Commonwealth v. Rigney, 4 Allen, 316.

A cropper is bound to use ordinary care in gathering the crop, and is not an insurer against loss by bad weather: Brown v. Owen, 94 Ind. 32.

A mere cropper who is without any interest in, or possession of, the premises, and who has merely tilled the ground and harvested the crops, after an entry for that purpose alone, is not entitled to notice to quit. In this respect he differs from a tenant: Davies v. Baldwin, 66 Mo. App. 577. After the crop is harvested and the land owner's share is, pursuant to the contract, set apart in a particular portion of a field where the cropper is to take it, his authority to enter upon that portion of the field ceases, and his entry thereon may constitute a trespass: Warner v. Hoisington, 42 Vt. 94. For all the purposes of making and gathering the crop, under a cropping contract, the actual possession is in the person contracting to till the soil, until the land owner's share of the crop and advances become due, or a division can be had, and the latter is entitled to demand his share and advances only when the crop is gathered and ready for division: Jordan v. Bryan, 103 N. C. 59, 9 S. E. 135.

IV. Cotenancy in Crop.

Every form of contract by which the use of land is given to one who is to cultivate it and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crop, and this is so whether the agreement between the parties is a lease or a mere cropping contract: Freeman on Cotenancy, 2d ed., sec. 100. In some cropping contracts a provision is inserted in effect that until the division of the crop the title and possession thereof shall remain in the owner of the land, and such a provision has led to confusion and conflict in the earlier cases. Under the later authorities it is clear that such a provision in the contract does not have the effect of preventing the parties from being cotenants in the crop, nor does it vest absolute title therein in the land owner until the crop is finally divided. In the well-considered case of Strangeway v. Eisenman, 68 Minn. 395, 71 N. W. 617, it was held that a cropping contract for the cultivation of land on the shares creates the relation of tenants in common in the crops as between the land owner and the cropper, and the only effect which can be given to the provision in the agreement, "that until division of the crops, the title and possession shall be and remain in the owner of the land," is that he shall hold the crops as security for the performance of the contract by the cropper. And the result must follow that so long as the cropper performs all the terms of the agreement, the land owner has no right to take the possession from him while the cropper has a right to the possession of the crops for the purpose of performing thereon the work which he is required to do under the contract.

In deciding this case in this way the court said: "The cases are in hopeless conflict as to the construction of contracts between the owner and occupier of land for its cultivation on shares, and as to the rights of the respective parties in the land and in the crops. We have no intention of going into any extended consideration of the subject or the cases. Those who wish to do so will find a quite full collection of the cases and discussion of the subject in the notes to the leading case of Putnam v. Wise, 37 Am. Dec. 309. See, also, Freeman on Cotenancy and Partition, sec. 100. No general rule can be laid down, applicable to all cases of agreements of this kind, because the precise nature of the interest or title between the contracting parties is largely a question of their intention, as expressed in the language they have used, and hence must depend upon the particular provisions of the contract itself. But it may be stated generally that the present tendency of the authorities is to hold that whenever there is a provision, in whatever form, for dividing the specific products of the premises, a tendency in common arises in the products which are to be divided. As applied to most agreements for the cultivation of land on shares, this view is much more in accordance with the actual intention as well as interest of both parties than to hold that either the owner or occupier of the land is the exclusive owner of the crops before division, and merely the debtor or creditor of the other for rent or wages. Taking the present contract by its four corners, and considering all its provisions together, we are satisfied that its true construction is that, whatever may have been the relation of the parties as to the land, they were tenants in common of the crops before division, and that, so long as defendant kept and performed all the terms of the contract, he was entitled to the possession and control of the crops for the purpose of performing upon them the labor in the way of harvesting, threshing, etc., which he had a right to do, and was required to do by the terms of his agreement. The provision that until division the title and possession should be and remain in the plaintiff, if given the effect claimed for it by him, would be as repugnant to both the letter and spirit of the other provisions in the contract as would be a provision that defendant should have no right to enter upon the premises at all, and that, if he did so, he would be a trespasser. The only effect that can be given to that provision consistent with the general purpose, as well as the other express provisions, of the contract, is that plaintiff should have the title, and, when necessary, the right to the possession, of the crops, as security for performance of the terms of the contract by the defendant. Any other construction would nullify the entire contract, and render impossible its performance by the defendant": Strangeway v. Eisenman, 68 Minn. 398, 71 N. Y. 617.

In Strangeway v. Eisenman, 68 Minn. 399, 71 N. W. 617, the case of Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142, deciding that such a contract is merely one of hiring, and that until

division the exclusive property in the crops is in the owner of the land, is, in effect, overruled. In Anderson v. Liston, 69 Minn. 82, 72 N. W. 52, the court again held that a similar agreement for the cultivation of land on the shares constituted the owner and cropper tenants in common of the crops, the title thereto remaining in the land owner only as security for the performance by the cropper of the terms of the agreement, and for the repayment of advances which the land owner might make the cropper, and for the payment of all indebtedness due from the latter to the former. To the same effect are the cases of Avery v. Stewart, 75 Minn. 106, 77 N. W. 560, 78 N. W. 244, and McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 437, 81 N. W. 830. The case last cited contains the latest expression of the court on the subject, and, after referring to Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142, and to Strangeway v. Eisenman, 68 Minn. 395, 71 N. W. 617, the court said:

"1. If it can be said that the contract construed and considered in the case of Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142, is similar in substance and effect to that involved in those cases, the porter case has been very quietly overruled. In the Porter case it was held that the contract there involved was just what it purported to be—a contract of hiring—that the absolute ownership of the crops raised thereunder belonged to the land owner, and that the cropper or hired man had no interest therein which was subject to levy on execution. The controversy in that case was between the cropper and one of his creditors. In the Strangeway and Anderson cases a doctrine quite contrary to this is expressly laid down. It is distinctly held in those cases that, until a division of the crops, the parties are tenants in common, with the right of the land owner to hold enough of the crops which would on a division belong to the cropper, as surety for advances made, and as further security.

"The contracts involved in the Strangeway and other late cases expressly recognize the right of the cropper to a share of the crop, and provide for a division thereof; but no such recognition is to be found in the Porter contract, nor does it contain a stipulation as to a division at all. For these reasons, we think the contracts are fairly distinguishable. But, if they are not, it is beyond question that the later cases in effect overrule the Porter case. In the Porter case, the land owner is held to be the absolute owner of the crops, with no right or interest in the cropper, while in the later cases it is distinctly held that the land owner and cropper are tenants in common. It is not important what a contract may be named or called by the parties. The real intention as expressed in the writing must control. And, as said by this court in the Strangeway case, contracts of this character must be so construed as to give force and effect to the intention of the parties. Under such a construction, there is no room for controversy but that the later decisions of this

court are correct, and in harmony with the general trend of the later authorities outside the state": McNeal v. Rider, 79 Minn. 156, 79 Am. St. Rep. 440, 441, 81 N. W. 830.

The rule as expounded by the late cases is that under a contract between the owner of land and an agricultural laborer, by which the former agrees to furnish the land and necessary teams, etc., and the latter the labor, the crops to be divided equally or otherwise between them, the parties are tenants in common of the crop until divided, no matter what the form of the contract entered into: Adams v. State, 87 Ala. 89, 6 South. 270; Ponder v. Rhea, 32 Ark. 435; Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; Creel v. Kirkham, 47 Ill. 344; Reynolds v. Reynolds, 48 Hun, 142.

The principle is everywhere observed that when one farms the land of another under an agreement by which he is to give the land owner a part of the crop raised, he and such owner, in the absence of stipulation to the contrary, become tenants in common of the crops raised, until a final division is made: Walker v. Fitts, 24 Pick. 191; Moser v. Lower, 48 Mo. App. 85; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Burns v. Winchell, 44 Hun, 261; Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S. W. 881. Under a cropping contract a land owner promised a cropper that if he put in and harvested a crop of wheat he should have his just and lawful share of it, but he afterward harvested and kept it himself, and it was held that they were tenants in common of the crop, and that the cropper could maintain assumpsit for the value of his share: McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256. And if there is a contract between an owner of land and another person whereby such other person is to cultivate the land and harvest the hay for a share thereof, but where the relation of landlord and tenant is not created by the contract, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the hay, and if one seizes the whole crop, either before or after severance, and disposes of it, it is a denial of the other's rights, and he may maintain trover for his share: Reed v. McRill, 41 Neb. 206, 59 N. W. 775. If an owner allows another to have his land for the purpose of raising a single crop upon it, the owner to have part of the crop for the use of the land, and the cultivator a part for his labor, and it was not the intention of the parties that the relation of landlord and tenant should exist between them, the parties are tenants in common of the crop: Ponder v. Rhea, 32 Ark. 435. Under a cropping contract which provides for an annual division of the crops between the owner of the land and the cropper, in equal shares, the parties are tenants in common of the crops raised until they are divided, and, after a division, each party owns that portion of the crops set apart to him: Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537; State v. Jewell, 34 N. J. L. 259; Wilber v. Sisson, 53 Barb. 258.

NORTHERN SUPPLY COMPANY v. WANGARD.

[117 Wis. 624, 94 N. W. 785.]

AN EXPRESS WARRANTY in Respect to any Particular Matter excludes the right to rely upon an implied warranty. (p. 965.)

SALE—Warranty, When Waived by Acceptance.—If goods are sold under a warranty, and, when delivered, there are defects discoverable by the exercise of ordinary care by a person of ordinary intelligence under the circumstances, and he nevertheless accepts the property, neither objecting then, nor within a reasonable time afterward, nor notifying the vendor that the goods will not be received in satisfaction of the contract, such defects are waived, and the vendee cannot subsequently rescind the contract of sale nor counterclaim for damages if sued for the purchase price, nor sue for breach of the warranty after paying for the property. (p. 967.)

SALE—Warranty, Implied, When not Waived.—The Implied Warranty Involved in an Executory Sale for Goods is not Waived by merely receiving them into the possession of the vendee. He may take a reasonable time thereafter to discover departures from the agreed quality, even as to matters evidenced by external appearances and to notify the vendor that the goods will not be accepted as satisfying the contract. (p. 968.)

Action to recover a balance claimed to be due for potatoes sold by the plaintiff to the defendant and delivered on board of the cars at Tomahawk, Wisconsin, at which place defendant was engaged in the grocery business. He interposed a counterclaim alleging that the potatoes were for use in his business; that one carload was guaranteed to be good, white, sound stock, suitable for such business, but proved, on examination a few days after being received, to be wholly unfit for the purposes for which they were purchased, and that he was damaged thereby in the sum of one hundred and fifty dollars, the difference between the actual value of the potatoes and what they would have been worth had they been as guaranteed, and also in the additional sum of thirty dollars from loss accruing from the defective potatoes being stored contiguous to a good stock.

At the trial the defendant's right to recover was by his counsel rested on a breach of an implied warranty of quality. The plaintiff on his part, insisted that the potatoes were sold under an executory contract, the title to be retained until the defendant received the merchandise, and hence that there was no implied warranty against defects which could be discovered by an ordinary, careful inspection, and that, if there was any breach of express warranty, it was because of obvious defects which were

waived by the acceptance of the potatoes without notice that the conditions of the warranty would be insisted upon. The court instructed the jury in harmony with the plaintiff's views, and a verdict was returned in his favor, upon which judgment was entered.

G. M. Sheldon and Flett & Porter, for the appellant.

A. H. Woodworth and Curtis & Reid, for the respondent.

[625] MARSHALL, J. Taking a general view of the instructions given in this case, which we are permitted to do within the scope of the exceptions thereto and the assignments of error, it appears that sufficient care was not used to carefully restrain the attention of the jury to the aspect of the evidence [626] tending to establish breach of implied warranty only. The rules governing such a warranty are radically different from those applicable to an express warranty. Where there is the latter in respect to any particular matter, it excludes the right that might otherwise exist to recover upon the former: Benjamin on Sales, sec. 672.

It is claimed by counsel for appellant that a recovery was sought on the counterclaim only upon implied warranty, and that the trial court intended to present only that aspect of the case to the jury. That is probably correct. We will treat the case upon that theory in disposing of the appeal.

The judgment must be reversed for error in the following instruction: "At the time when the potatoes in question reached Tomahawk, ready for delivery to the defendant, it was the defendant's duty to make an inspection and examination of them before removing them or accepting them, and he is chargeable with knowledge of all facts in relation to the condition of the potatoes at that time, that would have been discovered by such an examination by a person of ordinary intelligence, exercising ordinary care."

That language, explained by a further instruction suggesting to the jury that it was permissible to hold that appellant was bound to examine the potatoes to the extent of inspecting them for hidden defects before even removing them from the car, in order to preserve the right to insist upon the implied warranty, gave an erroneously prejudicial idea of the law. Here is the explanatory instruction: "If you shall find from all the evidence that by such an examination of the potatoes in question as a person of ordinary intelligence, exercising ordinary

care, would have made and would have discovered that these potatoes were defective, were to some extent hollow and had black stripes in them or were otherwise defective, then by accepting them and removing such potatoes, the defendant waived all right to object to the potatoes on the ground of such discoverable defects."

[627] Counsel for appellant makes a wrong use of Morehouse v. Comstock, 42 Wis. 626, in referring thereto as applicable to an implied warranty. It is there plainly indicated that the doctrine as to waiver of defects by accepting goods delivered pursuant to an executory contract without protest and notification to the vendor that the goods will not be deemed accepted in satisfaction of the contract, does not apply to executed contracts. That was more fully explained in Olson v. Mayer, 56 Wis. 551, 14 N. W. 640, where Morehouse v. Comstock was referred to and commented upon.

It is conceded that the contract in question here was executory in character. The title to the potatoes did not pass from seller to buyer till the transit thereof ended at Tomahawk and the property was accepted by the purchaser, actually or constructively, in satisfaction of the contract. As to such a contract the rule as stated in Locke v. Williamson, 40 Wis. 377, and many other cases in this court, governs: Olson v. Mayer, 56 Wis. 551, 14 N. W. 640; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777; Buffalo etc. Co. v. Phillips, 67 Wis. 132, 30 N. W. 295; Waupaca etc. Co. v. Milwaukee etc. Co., 112 Wis. 469, 88 N. W. 308; Bostwick v. Mutual etc. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246. The language of the rule as first formulated by this court was as follows: "When the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination, and knows of such defects, he must either when he receives the goods or within what, under the circumtances, is a reasonable time thereafter, notify the seller that the goods are not accepted a fulfilling the warranty; otherwise the defects will be deemed waived."

That has been changed somewhat by removing the feature contained in the literal sense at least of the quoted language, that there must not only be acceptance with full means of knowledge but with actual knowledge of the defects in order to waive the warranty in respect thereto, an idea which was [628] probably not intended to be embodied in the rule. Now, it is understood that the maxim caveat emptor will apply as to patent defects if the purchaser has full means of knowledge thereof by

the exercise of ordinary attention to his business, which requires him to at least look at what he buys as it comes into his possession, or when it is offered to him, or within a reasonable time thereafter, so as to observe patent imperfections if there are such. In the original statement of the rule the idea of the result of acceptance with knowledge and with means of knowledge should have been used in the disjunctive instead of the conjunctive. That is, a person is chargeable with knowledge of all that under the circumstances of the case he ought to know, and he is also chargeable with such knowledge as he in fact possesses, whether such possession is the result of the exercise of mere ordinary care or not.

There was a further development of the rule, so to speak, in Olson v. Mayer, 56 Wis. 551, 14 N. W. 640, by an explanation to the effect that a mere objection to property offered in satisfaction of an executory contract for the sale thereof is not sufficient to prevent a waiver of patent defects if the property is in fact accepted. There must be more. There must be at least notice to the seller, within what, under the circumstances, is a reasonable time, that the property is not accepted as satisfying the contract of purchase. The rule was there further explained, and such explanation was followed in Bostwick v. Mutual etc. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, to the effect that the mere taking possession of property, even with full opportunity then to observe that it is not according to the contract, does not waive patent defects where possession and time are necessary to separate the defective from the perfect portion and the purchaser elects to accept the former and reject the latter, and that merely receiving the property is not conclusive evidence of acceptance or waiver where possession is reasonably necessary in order to bring to the knowledge of the purchaser patent defects. That is within the general language of the rule that [620] the purchaser must at the time he receives the goods or within a reasonable time thereafter observe patent departures from the goods purchased which would ordinarily be observed by a person in handling his own property under the circumstances, if he were paying reasonable attention thereto, and at the time of such reception or within a reasonable time thereafter notify the seller either that the goods are not accepted at all or not accepted as satisfying the contract, or he will be held to have waived the patent defects.

In no case where this court has discussed the rule here involved is the idea advanced of inspection of property in the

sense of looking specially for defects or the idea of discovering defects not observable by viewing external indications, unless it is in McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777, in language there used, approving an instruction given by the trial court as substantially correct. It is plain, however, by the general treatment of the subject in the opinion, that there was no purpose in mind to extend the rule laid down in previous cases which were cited. In Buffalo etc. Co. v. Phillips, 67 Wis. 132, 30 N. W. 295, the court explained that such rule does not apply to defects that are not obvious and patent within the strict meaning of those words—defects that would attract the attention of a person in the exercise of ordinary care by applying his senses to the external appearances. It was said that defects in wire, apparent only by using it, and defects in the winding of rolls of wire apparent only on unwinding the rolls, were not such defects. One of the most recent cases decided by this court where the rule is stated is Waupaca etc. Co. v. Milwaukee etc. Co., 112 Wis. 469, 88 N. W. 308. This language was there used:

"If a person sells another property to be delivered, accompanying the sale with a warranty, and when delivery takes place there are defects in the property which are discoverable by a person of ordinary intelligence in the circumstances of [630] the purchaser, by the exercise of ordinary care, and such other nevertheless accepts the property, neither objecting thereto then nor within a reasonable time thereafter, he thereby waives the defects so that he can neither rescind the same, counterclaim for damages when sued for the purchase price, nor sue for damages for breach of warranty after paying for the property."

It would be well to read into that rule after the word "thereafter"—"nor notifying such person that the property will not be considered as in satisfaction of the contract."

From what has been said it will be easily seen that when the trial court, in the quoted instructions, gave the jury to understand that it was permissible for them to find that appellant waived the warranty by taking the potatoes from the car, even as to defects discoverable only by examining the internal condition thereof, he went altogether too far. The mere act of taking the potatoes from the car did not waive anything, necessarily. It was proper for appellant to receive the potatoes into his possession and to take what under the circumstances was a reasonable time to observe their condition, even as to matters evidenced by the external appearance thereof, and to notify the

respondent that the property, or a portion of it, was not accepted as satisfying the conditions of the purchase, without prejudice to his right to insist upon the warranty. The evidence is undisputed that within a very few days after the potatoes were taken from the car, and in the letter notifying the respondent of a return of the sacks in which they were shipped, the latter was advised that appellant would look to it to stand the loss from the potatoes not being such as he bargained for. That, obviously, was a sufficient notification to respondent that the potatoes, though received, were not accepted, as satisfying the purchase contract.

The judgment must be reversed and the cause remanded for a new trial in accordance with the legal principles here stated.

By the Court. So ordered.

A Vendee does not waive an implied warranty by receiving or accepting goods, if the defects therein are latent: Bierman v. City Mills Co., 151 N. Y. 482, 56 Am. St. Rep. 636, 45 N. E. 856. See, too, Miller v. Moore, 83 Ga. 684, 20 Am. St. Rep. 329, 10 S. E. 360; Northwestern Cordage Co. v. Rice, 5 N. Dak. 432, 57 Am. St. Rep. 563, 67 N. W. 298; Mack v. Snell, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. 493. But an implied warranty ordinarily survives acceptance only where the latent defects were not discoverable upon inspection: Waeber v. Talbot, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288. Acceptance after a full and fair opportunity of inspection estops the vendee from raising objections to visible defects and imperfections: Studer v. Bleistein, 115 N. Y. 316, 22 N. E. 243.

STATE v. WHITCHER.

[117 Wis. 668, 94 N. W. 787.]

THE WRIT of Certiorari Reaches Only Jurisdictional Errors when sued out to test the validity of some judicial or quasi judical proceeding. It has no other use except to bring before the court a record material to be considered in exercising jurisdiction in deciding a matter presented by some other writ. (p. 969.)

CERTIORARI and Habeas Corpus, Differences Between.—A writ of habeas corpus reaches the body, but not the record. It also reaches jurisdictional matters, but it does not reach the record. The writ of certiorari reaches the record, but not the body. (p. 969.)

HABEAS CORPUS—Certiorari, when Necessary in Proceedings by.—If, in a proceeding by habeas corpus, it is necessary to produce the record, upon which the detention is based, this may be accomplished by using certiorari as an ancillary proceeding. (p. 969.)

HABEAS CORPUS—Review of Decision upon.—A decision in a habeas corpus proceeding now stands in no different position from

one in any other proceeding. If it is desired to be reviewed on the merits, a motion should be made in the ordinary way for a review before the circuit court, and if it is desired to present the question whether the decision rendered is right, a writ of error should be prosecuted for that purpose. (pp. 970, 971.)

CERTIORARI to Review a Decision in Habeas Corpus.—An error of a court commissioner in remanding a prisoner in habeas corpus proceedings cannot be reviewed on certiorari. (p. 971.)

Wallace Ingalls, for the plaintiff in error.

Attorney general, Albert E. Buckmaster, district attorney, and W. D. Corrigan, second assistant attorney general, for the defendant in error.

671 MARSHALL, J. The question before us for decision is not whether the examining magistrate committed jurisdictional error in deciding that a proper case was presented to him upon the complaint and the evidence for holding the accused for trial, but whether the court commissioner, in the habeas corpus action committed jurisdictional error in deciding that the examining magistrate did not commit such error. That is a situation evidently not comprehended by counsel upon either side, who probably shaped their course in the light of State ex rel. McCaslin v. Smith, 65 Wis. 93, 26 N. W. 258, and Wright v. Wright, 74 Wis. 439, 43 N. W. 145. A writ of certiorari reaches only jurisdictional errors, when sued out 672 to test the validity of some judicial or quasi judicial proceeding. It has no other use, except to bring before the court a record material to be considered in exercising jurisdiction in deciding a matter presented by some other writ: State ex rel. Fourth Nat. Bank v. Johnson, 103 Wis. 591, 79 N. W. 1081. But in the case before us it was so used. A writ of habeas corpus reaches the body but not the record; it also reaches jurisdictional matters, but it does not reach the record. A writ of certiorari reaches the record but not the body. So when jurisdiction is obtained by the issuance of a writ of habeas corpus to bring the body of the person whose liberty is involved into court, if it be necessary to produce the record upon which his detention is based, that may be accomplished by using the writ of certiorari as an ancillary proceeding. When it is used as the foundation for jurisdiction to bring up and decide upon the validity of a judicial determination by any body or officer, jurisdictional questions only are reached and such questions pertaining to the determination made by the officer or body particularly complained of: Barnes v. Schmitz, 44 Wis. 482; Alford

v. Jacobson, 46 Wis. 574, 1 N. W. 233; State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N. W. 1046; State ex rel. Augusta v. Losby, 115 Wis. 57, 67, 90 N. W. 188, 1135.

The practice of testing the validity of decisions of circuit court commissioners in habeas corpus proceedings by writ of certiorari, no question being raised other than that the commissioner did not decide right upon the merits of the application, grew up apparently unchallenged from the ancient rule, having now no place in our jurisprudence, that a person illegally restrained of his liberty may have successive writs of habeas corpus till he finally vindicates his right; that the decision upon one writ is not res judicata upon a subsequent writ involving the same matter; and that failure to decide favorably to the right to be set at liberty, if error at all, is jurisdictional error. It must now be considered that where [673] there is jurisdiction to hear the proceedings upon the writ, error in deciding the questions involved is judicial error. In short, a judicial officer, in such a matter, has the same jurisdiction to commit error as he has in deciding a question presented in any other action. Therefore the proceedings to obtain a review thereof must necessarily be appropriate to reach judicial, not jurisdictional errors.

The last relic of the practice that all errors committed in habeas corpus proceedings are jurisdictional errors and therefore that in case of a challenge of a decision upon writ of error, or certiorari a decision relievably wrong at all may properly be regarded as jurisdictionally wrong, was swept away by the statutory change giving the state as well as the accused the benefit of a writ of error to obtain a review of a judgment in a habeas corpus action before this court. Now, the suing out of a writ of habeas corpus is in effect the commencement of an action wherein there is a plaintiff and defendant. The conclusion reached in the first instance, whether it be by a judge at chambers or a circuit court commissioner exercising the powers of a judge at chambers, within the jurisdiction of the officer to decide at all, is res judicata till set aside by some subsequent proceeding in the same matter according to the legal procedure for reviewing judicial errors: State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N. W. 1046.

It is well understood, generally speaking, that a circuit court commissioner, in deciding questions which he has jurisdiction to decide, does not commit jurisdictional error merely because of reaching a wrong conclusion. A decision in a habeas cor-

pus action now stands in no different position than one in any other proceeding. If it be desired to review it upon the merits a motion should be made in the ordinary way for a review before the circuit court: In re Hammer, 113 Wis. 96, 89 N. W. 111. If it be desired thereafter to present the question of whether the decision rendered is right, a writ of error may be sued out of this court for that purpose.

674 As no question was brought before the circuit court upon the writ of certiorari except as to whether the court commissioner committed jurisdictional error, and it is not claimed that he exceeded his jurisdiction but only that he decided wrong upon the merits in acting within such jurisdiction, manifestly the circuit court could not legitimately have acted otherwise than to confirm his order.

By the Court. The order and judgment are affirmed.

Upon Certiorari the question of jurisdiction is the limit of inquiry: Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93; Fulton v. State, 103 Wis. 238, 74 Am. St. Rep. 854, 79 N. W. 234. On the scope of certiorari in general, see the monographic notes to Duggen v. McGruder, 12 Am. Dec. 529-537; Wulzen v. Board of Supervisors, 40 Am. St. Rep. 29-46; and the subsequent cases of McDugle v. Filmer, 79 Miss. 53, 89 Am. St. Rep. 582, 29 South. 996; Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co., 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107. The writ of certiorari may issue by the supreme court of Montana to bring up for review, on habeas corpus, the proceedings of the district court relating to the conviction and sentence of the prisoner for alleged contempt: In re MacKnight, 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.

Decisions in Habeas Corpus proceedings are reviewable by writ of error or petition in error: Barranger v. Baum, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524; In re Van Sciever, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037. But see State v. Grottkau, 73 Wis. 589, 9 Am. St. Rep. 816, 41 N. W. 80, 1063; Ex parte Jilz, 64 Mo. 205, 27 Am. Rep. 218.

CASES

IN THE

SUPREME COURT

OF

WYOMING.

KINNEY v. FIRST NATIONAL BANK.

[10 Wyo. 115, 67 Pac. 471.]

SALES—Delivery of Possession.—Upon a sale of personalty, delivery of possession is sufficient, as against third persons, if it is such as the situation of the property admits, and if the chattels are so situated that there can be no immediate delivery, it is sufficient if the vendee, without laches, takes possession in a reasonable time after he has an opportunity to do so. (p. 974.)

SALES—Delivery of Possession.—If upon the sale of all of a large band of sheep supposed to contain a certain number, it is unexpectedly found at the time and place of delivery that a considerable number have strayed, and the remainder are delivered, whereupon the purchaser institutes search for the strays without success, there is sufficient delivery of the missing sheep to consummate their sale as against a judgment creditor of the seller, who upon finding them levies on and sells them under execution. (p. 975.)

SALES—Delivery of Possession—Subsequent Mortgage.—If after the whole of a lot of personal property is sold and part thereof delivered, the seller mortgages the part not then delivered to a third person, this fact does not, in the absence of fraud, in any way affect the rights of the vendee who never assented to, or had notice of, such mortgage. (p. 976.)

J. H. Chiles and J. W. Lacey, for the plaintiffs in error.

D. A. Reavill and N. E. Corthell, for the defendant in error.

116 CORN, J. The bank sued to recover damages for the conversion of certain sheep. On April 6, 1895, to secure a note due in one year, one Edward S. Murray mortgaged to the bank all his sheep, recited to be about ten thousand five hundred head. The mortgage was afterward renewed by filing the statutory

affidavit continuing it in force to April 6, 1897. On February 17, 1897, Murray agreed to turn over all the sheep, supposed at that time to be about seven thousand seven hundred, to the bank, and it was to give him credit upon his note and mortgage at the rate of two dollars and twenty-five cents a head. On request of the bank, the foreman having them in charge, under instructions from Murray, had the herd at Bitter Creek for delivery on March 12th. Prior to this the bank had sold the sheep to one John G. Edwards and sent him to Bitter Creek on the 12th to receive them. The bank obtained a written order from Murray upon his foreman for the delivery, which was turned over by it to Edwards, [117] and he, in turn, presented it to the foreman and received the sheep. Upon a count, it was found that the herd was short about fifteen hundred, and Edwards received only six thousand two hundred and nine head. He paid for these on the 13th, and the bank gave Murray credit for them at the agreed price. It instituted inquiries and sent men out to search for the remainder, but only nine head, which had strayed into one Draper's band while the herd was being driven to Bitter Creek for delivery, were found in the next few days. Subsequently, and a month or more after the maturity of the note of Murray to the bank, the plaintiff in error found about one thousand head of them and had them levied upon and sold under executions against Murray, plaintiff in error being the purchaser at the sale. Prior to this sale the bank gave notice to plaintiff in error that they belonged to it and demanded possession of them. Subsequently, the bank brought this suit and then gave Murray credit for the number sold under execution by plaintiff in error at the agreed price of two dollars and twenty-five cents per head.

[121] There is no material disagreement as to the facts of this case, and, in our opinion, there is but one question involved: Was there a sale and delivery of the mortgaged property by the mortgagor to the mortgagee, such as would pass title to it as against an execution creditor of the mortgagor?

That there was a contract of sale by which the bank was to receive all the mortgaged sheep, supposed to be about seven thousand seven hundred head, and give the mortgagor, Murray, credit upon his indebtedness at the agreed rate per head, there can be no question under the evidence. The parties undertook to perfect this sale by an actual delivery of the entire herd. Murray directed his foreman to drive the herd to the place designated for delivering them, and the bank sent Edwards to

the same place with authority to receive them for it. At the same time Murray gave to the bank a written order upon his foreman, directing him to turn them over to Edwards, and the order was handed to Edwards by the bank. This paper was lost and the foreman and Gildersleeve, who obtained it for the [122] bank, differ in their testimony as to its wording. The foreman testifies "it said to turn what sheep I had in my possession over to John G. Edwards and to take a receipt for them." Gildersleeve states that its language, as nearly as he can remember, was: "Deliver to J. G. Edwards all my sheep, keeping track of number turned over, and report count to me." But the precise terms of the order are not material, from the fact that at the time it was given all parties concerned supposed that substantially the entire herd, consisting of about seven thousand seven hundred, was in the possession, or under the control, of Murray's foreman. Gildersleeve, the assistant cashier of defendant in error, testifies that Murray told him prior to the delivery that he thought some had strayed and he would probably find them in a few days. The evidence shows that it was a wild and uninhabited country there, and that it was not unusual for small bands to stray away from the herds. But that this large number had strayed was only discovered when they were counted out to Edwards. Even the foreman was ignorant of it, except as to eight or nine head which had gotten mixed with the Draper herd in driving them to the place of delivery. And it is clear from the evidence that both Murray and the bank expected that he would turn over and it would actually receive substantially the entire herd of about seven thousand seven hundred, on the 12th of March, at Bitter Creek.

That the property passed as between the mortgagor and the mortgagee is, therefore, clearly proven, and the only question to be determined is whether there was a sufficient delivery with respect to third persons.

The well-established rule is that it is enough if the delivery be such as the situation of the property admits. And when chattels are so situated that there can be no immediate delivery, the law requires none; and it is sufficient if the vendee without laches takes possession in a reasonable time after he has an opportunity to do so: Benjamin on Sales, Bennett's ed., 659; Ricker v. Cross, 5 N. H. 570, 22 Am. Dec. 480; 14 Am. & Eng. Ency. of Law, 2d ed., 382. The rule is illustrated by the sale of a ship at sea or its cargo. If possession is taken within a rea-

sonable [123] time after their arrival it is sufficient. In Ricker v. Cross, 5 N. H. 570, 22 Am. Dec. 480, a debtor transferred to the plaintiffs certain personal property, including a chaise and harness, for their benefit as creditors. The chaise and harness were in possession, at a distance, of a person who had hired them, but the remainder was delivered in the name of the whole. An attachment was levied upon them while in the possession of the hirer on his way to the place where he hired them. It was held that the plaintiffs were entitled to hold them against the officer.

We think the facts bring this case quite clearly within the rule. There was an attempt upon the part of Murray to deliver, and of the bank to receive, possession of all the property on the day appointed for the transfer. The small number which had become mixed with the Draper herd were reclaimed a few days afterward. Gildesleeve testifies that he made inquiries at once in regard to the missing part of the herd, and on March 25th sent out two men, who searched for them about a week, and the search was then discontinued, principally on account of stormy weather. When they were found and levied upon by plaintiff in error the bank notified plaintiff in error that they were its property and at the sale gave formal public notice of the fact and demanded possession of them.

It is contended that the fact that the plaintiff only credited the mortgagor on March 12th with the number actually received at that time, is proof that it only purchased from him that number. But we think the evidence clearly shows that there was a sale of all the mortgaged property, the exact number of sheep to be ascertained by a count and credited accordingly. But Murray's foreman testifies that when, upon a count of the sheep, they were found to be short, he told Edwards there were some which had gotten mixed with the Draper band, and if he would send a man with him he would go and get them, but that Edwards refused. The defendant offered to prove further that Edwards' reply was: "I only bought from Murray the sheep that I receive [124] here at Bitter Creek." Upon objection by the plaintiff the proffered evidence was excluded. We think the evidence was not material, and that its exclusion was not error. The testimony for the plaintiff shows that the sale to Edwards was a separate transaction and there was no evidence to the contrary. He represented the bank in receiving the property for it, and there is no evidence what-

ever tending to show that he represented it in any matter connected with the sale of it to him. In regard to that he acted for himself. But it is further contended that as, admittedly, he acted as agent for the bank in receiving the property, his refusal to send for this part of it was a refusal of the bank to accept the delivery of any sheep not in the immediate possession of Murray's foreman and shows that it purchased only those delivered at that time. But admitting that it is competent for that purpose and tends to support that conclusion, yet it only affects the question of the preponderance of the evidence. And the proof is conclusive that a few days afterward the bank sent for and gathered up the nine head which had strayed into the Draper herd and instituted search for the missing remainder. We do not think, therefore, that the claim of plaintiff in error, that the bank refused, or failed, to accept any part of the herd except what was in the immediate possession of the foreman, is sustained by the evidence. But we think the great preponderance is in favor of the conclusion that it took, or attempted to take, possession of the entire herd as soon as opportunity offered.

There was also an offer by the defendant, plaintiff in error, to prove that Murray gave a mortgage upon the missing sheep to one Mrs. J. W. Roder, upon April 8, 1897, subsequent to the sale; and it is contended that this evidence was admissible, especially under the averment in the petition and its denial in the answer that Murray had abandoned these sheep to the bank. The averment that Murray at the time of the delivery, and always afterward, abandoned them to the bank seems to have been intended to meet the requirement of the law in such cases that the [125] change of possession must be not merely colorable, but actual and continued. But whatever may have been the precise intention of the pleader, we are very clearly of the opinion that this averment cannot have the effect to introduce a new issue into the case and make it a material question whether Murray at some time subsequent to the sale and delivery, undertook to assert ownership and control of the property. There is no intimation of fraud in the transaction between Murray and the bank, and there is no claim that the bank assented to, or had notice of, any attempt of Murray to exercise such control. Consequently, nothing that he may have said or done concerning the property after he parted with it could by any possibility bind the bank or affect its rights in any way: Toms v. Whitmore, 6 Wyo. 220, 44 Pac. 57. The evidence

was properly excluded. We find no error in the record and the judgment will be affirmed.

Potter, C. J., and Knight, J., concur.

As to what Delivery or Change of Possession of property sold is sufficient as against creditors and subsequent purchasers, see the monographic note to Claflin v. Rosenberg, 97 Am. Dec. 340-348. Consult, also, Baldwin v. Thayer, 71 N. H. 257, 43 Am. St. Rep. 510, 52 Atl. 852; H. M. Tyler Lumber Co. v. Charlton, 128 Mich. 299, 87 N. W. 268, 92 Am. St. Rep. 452, and cases cited in the cross-reference note thereto. In deciding the sufficiency of possession of the purchaser of chattels to protect him, the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business, must all be considered: Stephens v. Gifford, 137 Pa. St. 219, 21 Am. St. Rep. 868, 20 Atl. 542; Renninger v. Spatz, 128 Pa. St. 524, 15 Am. St. Rep. 692, 18 Atl. 405. As to whether taking possession of a part of the subject of sale is sufficient, see Thompson Mfg. Co. v. Smith, 67 N. H. 409, 68 Am. St. Rep. 679, 29 Atl. 405. That a manual delivery or actual change of possession is not in all causes essential where livestock is sold, see Goodwin v. Goodwin, 90 Me. 23, 60 Am. St. Rep. 231, 37 Atl. 352; Webster v. Anderson, 42 Mich. 554, 36 Am. Rep. 452, 4 N. W. 288.

COSGRIFF BROTHERS v. MILLER.

[10 Wyo. 190, 68 Pac. 206.]

TRESPASS by Livestock on Uninclosed Lands.—Although a person is not liable for trespass if his livestock, running at large, stray upon uninclosed premises, yet if he drives or permits such stock to be driven, intentionally and persistently, upon the uninclosed lands of another, against his will, a trespass occurs for which he may recover. (p. 989.)

TRESPASS on Uninclosed Land by Livestock.—If a person knowing that uninclosed land is the property of another, deliberately and intentionally drives his livestock thereon and depastures the land against the express will or consent of the land owner, the one so acting is guilty of an actionable trespass, and is liable in damages for the injury done. (pp. 991, 992.)

TRESPASS on Uninclosed Land—Absence of Marked Boundary.—If a person knowing uninclosed land to belong to another, deliberately drives his livestock thereon and depastures the land against the expressed will and consent of the owner, he cannot escape liability for the trespass thus committed because of his inability to identify such land, caused by the failure of the owner to erect any artificial markings of the boundaries. (p. 993.)

DAMAGES—Special.—If Evidence showing special damage has been admitted without objection, a complaint that the allegations of the petition are insufficient to cover special damage comes too late after verdict. (p. 997.)

TRESPASS—Damages—Evidence.—If in trespass for grazing sheep upon and depasturing the land of plaintiff who is the owner of a large number of sheep ordinarily kept by grazing thereon, it is admitted that there are no other available sheep ranges in the vicinity, evidence is admissible under a general allegation of damage to show that during the winter following such trespass, plaintiff necessarily incurred expense in feeding hay to his sheep in consequence of the trespass, as tending to show the value of the range thus destroyed and the damage to his possessions. (p. 998.)

IN TRESPASS Continuing Damages may be Computed and Given after the commencement of the suit if they proceed from the act therein complained of as the cause of action. (p. 1000.)

EXEMPLARY DAMAGES.—If Malice, Fraud, Gross Negligence or Recklessness enters into the commission of a tort, or if the act is done wantonly, exemplary damages are recoverable irrespective of criminal liability. (p. 1001.)

TRESPASS—Exemplary Damages.—A claim of right, asserted in good faith, under a mistaken notion of the law, is not sufficient to absolve a trespasser from liability for exemplary damages in a case otherwise warranting their infliction. (p. 1003.)

DAMAGES—Exemplary.—Evidence of Financial Condition of Defendant is admissible in cases founded in tort, where exemplary damages are claimed. (p. 1003.)

F. Chatterton and Van Orsdel & Burdick, for the plaintiffs in error.

McMicken & Blydenburgh and J. W. Lacey, for the defendant in error.

209 POTTER, C. J. This action was instituted in the district court for Carbon county by Isaac C. Miller, against Cosgriff Brothers, a partnership composed of John B., Thomas A. and James E. Cosgriff. It is an action for damages for an alleged trespass upon certain lands leased by the plaintiff from the Union Pacific Railroad Company, and there was also a prayer for an injunction pendente lite restraining a continuance of the trespass, and that at the final hearing the injunction be made permanent. The trespass is alleged to have been committed by sheep, and that with six thousand head of sheep during part of the time, and with them and an additional six thousand head during the remainder of the trespass sued for, the defendants trod down and trampled upon the premises of plaintiff, and grazed off the grass thereon and depastured the same. The trespass is alleged to have occurred during 210 the first thirteen days of November, 1898. The value of the grass depastured during the first six days is averred to have been more than eight hundred dollars; and afterward the grazing is averred to

have resulted to the damage of plaintiff in the sum of two thousand dollars.

Plaintiff alleges in the petition that on September 7, 1898, he duly notified defendants that he had leased and was entitled to the lands in question, and that they were required not to permit their stock to enter thereon; and that, upon being informed of the trespass of defendants occurring from the first to the sixth day of November, inclusive, the plaintiff gave them further notice that their sheep were depasturing said lands, and to keep them off of the same; but that defendants refused to remove their sheep or to cease depasturing plaintiff's lands.

It is then alleged in substance that plaintiff is the owner of fifteen thousand head of sheep, and had preserved the grasses upon said lands for the purpose of grazing his sheep thereon during the winter of 1898-99; that defendants threatened to depasture the lands of all the grass thereon, and that their depasturing thereof had destroyed a large portion of the value of the lands for grazing during the winter; that the other ranges for sheep in the vicinity of said lands are either leased or occupied by defendants or others engaged in the sheep industry, and that defendants have maliciously and willfully depastured the lands, and with a desire to injure plaintiff and to cause his sheep to be devoid of sustenance during the winter, whereby they might die and the plaintiff lose large sums of money; "by which said acts of defendants in said mischievous, negligent and malicious manner, the plaintiff has been damaged in the sum of twenty-five thousand dollars."

It is further averred that if defendants are permitted to continue trespassing upon and depasturing said lands plaintiff will be irreparably damaged for lack of other range for his sheep, and from the want of sustenance and pasture for his sheep.

[211] Defendants by their answer admit the truth of plaintiff's allegation that the other ranges for sheep in the vicinity of the lands in question were leased and occupied by defendants and others engaged in the sheep industry. Every other allegation of the petition above referred to is denied by the answer. For a second defense, it is alleged in substance that for more than fifteen years prior to the time when plaintiff claims to have obtained an interest in the said lands, defendants, being residents of Carbon county, and engaged in the business of sheep-raising in said county, had driven, herded, ranged and fed their herds of sheep upon the open range and

public domain in the immediate vicinity of the lands in question; that they were lawfully seised and entitled to the possession of certain tracts of land adjacent to and in the vicinity of the lands claimed by plaintiff, and engaged in raising sheep thereon.

It is then averred as follows: "That the lands claimed by plaintiff in this action are comprised within and are a part of the odd-numbered sections of land, according to the United States government survey, within what is know as the twenty-mile limit on each side of the roadbed and track of the Union Pacific railroad; that the even-numbered sections, according to said survey within said twenty-mile limit, were at all the times in said petiton mentioned, and for more than twenty-one years prior thereto, and ever since have been, and now are, a part of the unoccupied and unappropriated public domain of the United States of America, except as to a few scattered even-numbered sections and some minor subdivisions of said sections, which are held and occupied by actual settlers; that for more than twenty-one years prior to the dates and times complained of by plaintiff, and at all said times, and ever since then, the lands within said twenty-mile limit in said county . . . . have been and now are wholly unfenced and uninclosed, and neither the lands claimed by plaintiff nor any other of said lands . . . . except those actually settled upon, as aforesaid, have any fences, or other artificial or natural marks whatever, whereby [312] notice is given of the boundaries or lines of the lands claimed by plaintiff, or of the lines between the even-numbered and the odd-numbered sections of said lands; and that . . . . it has been and is impossible for defendants to distinguish the lands claimed by plaintiff from the alternate even-numbered sections of land, within said twenty-mile limit, the same being alike open and uninclosed.

"That for more than twenty-one years continuously next preceding the times complained of by plaintiff the lands described in the petition and all other lands within said twenty-mile limit in said county of Carbon have been an open common, on which flocks and herds of cattle and sheep have been permitted to be driven, herded and also to run at large and to range and graze at will; and during all said time the government of the United States has permitted and still permits residents of the State (formerly territory) of Wyoming to go upon its unoccupied and unappropriated public domain within said State (formerly territory) and to drive, herd, range and feed their flocks and herds of cattle and

sheep upon the ranges thereof, and to have common of pasture thereon; and defendants allege that to enable these defendants to go with their sheep from their own lands to the ranges upon the public lands within said twenty-mile limit in said county, to obtain food and sustenance for the sheep of defendants from the grasses and herbage thereon, it is absolutely necessary to go upon and over the lands described in plaintiff's petition; and that the location of many of the even-numbered sections of land within said twenty-mile limit, in the vicinity of the lands described in said petition, and of those claimed by these defendants, ... is such that the lands described in said petition are ways of necessity to enable defendants to drive their sheep from the lands of defendants to and upon the ranges on the public lands aforesaid."

We have ventured to quote at such length from the answer, for the reason that the matter quoted will disclose with much clearness the principal issue presented by defendants, and some repetition or explanation may be saved hereafter.

[213] Following the alegations quoted above, the answer avers that the ranges owned by the defendants are wholly insufficient to furnish pasture for the sheep belonging to them during the winter then approaching; that the other ranges for sheep in that vicinity are occupied by plaintiff and other owners of sheep; and that if defendants are denied access to the open ranges aforesaid, in common with others, they will be deprived of their right of pasturage upon the public lands, and will suffer great and irreparable injury.

Plaintiff filed a reply, admitting some of the allegations of the second defense set out in the answer, and denying others; and generally denying that any of them constituted a defense to the action. A demurrer to the said defense had been overruled. Among other denials, the reply denies that it has been and is impossible to distinguish the lands of plaintiff from the alternate even-numbered sections of land, and alleges that the section and quarter section corners, as surveyed by the government, are marked by stones bearing appropriate marks and designations, whereby all persons may take notice and are compelled to take notice of the boundaries and lines between the various sections. The fact that the lands were unfenced and uninclosed was admitted.

The cause was tried to a jury. A verdict was returned for the plaintiff, fixing the damages at six thousand five

hundred dollars. Thereafter defendants filed a motion for a new trial, which was overruled, and they bring the case to this court on error.

The first and principle question in the case arises upon the errors assigned in respect to the giving of certain instructions requested by the plaintiff and the refusal of certain instructions requested by the defendants. The instructions given, thus referred to, are numbered 1, 5, 8, 9, 10 and 13 of those requested by the plaintiff.

The first instruction informed the jury "that force and arms" does not mean actual force or dangerous weapons, but that if the defendants, or their servants, entered upon plaintiff's lands contrary to his expressed will, and if they knew [214] it was contrary to his expressed will, then the entry would be with "force and arms"; and that it was not necessary that they should have actually broken into any inclosure or through any fence. The fifth instruction was as follows: "The court instructs the jury that, after having received notice that the lands mentioned in the petition were leased by the plaintiff, it was the duty of the defendants to ascertain where these lands were, and to prevent their sheep from being driven thereon and depasturing the same."

The jury was charged by the eighth instruction "that in this country there is no such thing as a right of common, the government of the United States has permitted and still does permit citizens, owners of stock, to graze their herds upon its unoccupied public domain, but there is no right conferred upon those who do so that the government cannot rescind at any time, and whenever it parts with its title to any of its public domain, it gives the parties who may acquire any such lands the right to enjoy them without any rights reserved to others to graze thereon with their flocks and herds, notwithstanding that, for some time prior, citizens may have grazed their flocks and herds thereon without molestation or refusal on the part of the government."

The ninth instruction stated substantially that it is the duty of all persons to take notice of the stones and marks of the government survey, and that there was no necessity for plaintiff to place any other or different marks, monuments or designations on his lands.

The tenth instruction was as follows: "The court instructs the jury that if they find from the evidence that the defendants, after receiving the notice or notices from the plaintiff which

have been read in evidence, drove or caused to be driven their sheep upon the lands of plaintiff mentioned in the petition with the intention or purpose that the said sheep should be grazed or herded upon the lands mentioned in the petition, and surrounding lands, without regard for the ownership of said lands, and that the defendants had placed an employé or employés of theirs, [215] or herders in charge of such sheep, who could and was to keep such sheep together in the flock or herd, and who was to have a general control over such sheep, and that such herder or employé did remain with such sheep, and did exercise a general control over them, and was with them on any of the plaintiff's lands named in the petition at the time or times the said sheep were grazing on such lands, or were regularly bedded or kept upon the same with the permission of such herder, and in pursuance of the intention of the defendants to have their sheep grazed and herded indiscriminately on the lands of plaintiffs, as well as other lands in that vicinity, then the jury must find for the plaintiff."

In the thirteenth instruction the jury were charged that the fact of the trespass was proven, and that there was no denial upon the part of the defendants that such trespass occurred, so that, in any event, they were to find for the plaintiff. The remainer of that instruction refers to the matter of damages.

The court gave to the jury some instructions requested by defendant, bearing upon the question of the trespass, and as illustrative of the view taken of the law by the trial court, we will briefly mention the main points involved in those given before passing to those whose rejection is complained of. The jury were thus told that it was admitted by the pleadings that the even-numbered sections adjoining the odd-numbered sections described in the petition were uninclosed and unoccupied government land, and for more than twenty-one years the government had permitted livestock owners to graze their flocks and herds thereon in common; that it is a rule of law, grown out of a custom long standing, that the uninclosed public lands, on which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them for said purpose, no act of government forbidding the same; that, while it is true there is in this country no such thing as "right of common," or "common of pasturage," yet the government permits owners of stock to graze their herds on the unoccupied public

[216] domain, and all citizens have the right to graze their flocks and herds thereon in common; that plaintiff, by obtaining an interest in the odd-numbered sections, did not obtain any greater right to the adjoining even-numbered sections than any other citizen, and that he had no right to use his lands so as to prevent others from pasturing their stock upon the government sections.

The defendants requested an instruction to the effect that plaintiff could not recover unless his lands were inclosed by a lawful fence, or the defendants drove their sheep upon the lands, knowing them to be the lands of plaintiff. The court refused to give it, as also the following: That unless the notice to defendants to keep off the lands contained a description thereof, either by legal subdivision or by metes and bounds, so that defendants could find them without difficulty, and unless the description in the notice was sufficient to enable an ordinarily intelligent person to find the same; or if it was impossible for such person to ascertain or distinguish the boundaries as described in the notice, then defendants were not required to take a surveyor and ascertain the boundaries; but it was plaintiff's duty to so mark them by fences or inclosures, or other indentifying marks, as to distinguish the boundaries thereof from boundaries of the adjoining unoccupied public domain. That plaintiff could not recover unless his lands were inclosed by a lawful fence, or the boundaries so marked as to be clearly distinguished by defendants and their herdsmen; and the court was requested to state to the jury the statutory requirements for a lawful fence. That plaintiff could not recover if defendants were ignorant of the actual boundaries of plaintiff's lands. That, being unfenced and not marked so as to be distinguished by strangers, the right of plaintiff to the grasses and herbage on his lands appertains only to such lands as are in his actual possession and occupancy.

The defendants also requested the court to give to the jury the following: "The court instructs the jury that the lands within this state lying uninclosed outside of the cities [217] and towns, whether belonging to the government or to private individuals, is common pasture ground, and may lawfully be roamed over and pastured upon by the livestock, flocks and herds of all the people of this state, subject only to the right of any such private individual to drive off any such livestock, flocks or herds as may be found roaming or

pasturing upon any such uninclosed lands belonging to such private individual, and such owner of livestock, flocks or herds cannot be held liable in damages for any injury done to such uninclosed lands by any such roaming or pasturing upon them."

The court also refused, upon request of defendants, to instruct the jury to the effect that defendants had a right to go upon and across the lands of plaintiffs, if necessary to do so in order to reach the unoccupied public lands; and that if they crossed said lands for that purpose they would not be liable for the pasturage consumed in doing so, if they used reasonable care and diligence in so driving their sheep across the lands of plaintiff.

We have adverted with so much particularity to the instructions given, and the requests refused, not only because the giving of the instructions and refusal of the requests are assigned as error, but also for the reason that they present quite clearly the issue between the parties respecting the legal principles that should govern a determination of the charge of trespass preferred against the defendants.

In the petition fifty-two sections of land, or about that number, were described as either owned or leased by plaintiff, but on the trial the proof of the trespass related to but nineteen sections, all of them being odd-numbered sections; the alternate even-numbered sections being unoccupied and unappropriated public lands, and including in the neighborhood of twenty sections. The nineteen sections of plaintiff's land involved in the controversy are located in townships 22 and 23 north of range 85 west, four of them being in township 22 and the others in 23. Together, therefore, with the adjoining alternate sections we have a scope of country about eight miles one way and six miles the other, the odd and even numbered sections alternating like the squares upon a checker-board. The land is located in what is known as the twenty-mile limit, within which the odd-numbered sections were granted by the government to the Union Pacific Railroad Company.

The notice sent to defendants in September informed them that the plaintiff had recently leased from the railroad company "all the land owned by them along the Platte river, extending north from the ranch of Frank Williams to the twenty-mile limit, and west of the river six miles," and stated that the notice was given so that they could instruct their

employés to respect his rights and keep their stock off of said leased land. On the second day of November the foreman in charge of plaintiff's sheep, according to his testimony, found three of the herds belonging to defendants on plaintiff's lands, viz., on section 7, in township 22, and they had eaten all the grass therefrom. He told the employés of defendants that they were on plaintiff's land.

Plaintiff's foreman moved the sheep of defendants off the lands of plaintiff on three different days—on the 4th, 5th, and 6th of November; but they were driven back, and from the 8th to the 13th of November they grazed over the remainder of the nineteen sections.

On the third day of November the said foreman delivered for the plaintiff a written notice to one of the defendants, the notice being directed to the firm, which, after referring to the previous notice, and that his foreman had advised him that they, the defendants, were on his land with sheep, and had refused to remove them, described by section number, giving also the range number, the lands leased by plaintiff, with the additional information that his land commences at Williams' corner and takes in "all the railroad land to the land I purchased last year [purchased land was to twenty-mile line] and runs six miles west to George Ferris' land." Defendants were thereby requested to remove their sheep [219] at once from the land mentioned, or any other land plaintiff owned.

Notwithstanding the verbal demands of Miller's foreman, and the requests of the written notice, the defendants instructed their herders to occupy the old ranges, although they testify that they gave no particular orders as to the Miller lands. They did not deny upon the trial that their sheep were driven upon the lands of plaintiff, as claimed, and depastured them; but, as we understand the testimony of the defendants, their position was that they did not know what lands belonged to the plaintiff, as they were not fenced, marked or distinguished in any way from the other lands in that vicinity; and that their intention was to continue to graze their sheep as they had done before, until Mr. Miller should show them what lands he claimed by designating them in some other way than by a vague description, as they were unable to distinguish between the odd and even numbered sections. Indeed, Mr. Thomas Cosgriff testified that he said to plaintiff's foreman, on or about the second day of No-

vember, that "We had no knowledge of the lands which Mr. Miller claimed; that when he would show it to us that these certain lands were his, we would respect his rights. Until then our sheep would continue to graze as they had always been."

The right insisted upon by defendants, as we understand it, was that, as they were free to pasture their sheep upon the even-numbered public lands, they were privileged to drive their sheep and graze them indiscriminately upon all the uninclosed lands in that neighborhood, including the lands claimed by plaintiff, unless the boundaries of the latter were marked or designated upon the ground, so as to be readily identified.

Although there seems to have been some claim made that they had a right of way by necessity across plaintiff's lands to the government sections, we think the evidence discloses that there was no more effort on the part of defendants to locate the public lands than there was to ascertain the boundaries [220] of the lands leased by Miller; and that the depasturing of the lands of the latter was not the result merely of driving the sheep over and across them in order to reach and graze them upon the public domain. The question as to the right of defendants, therefore, to have used Miller's lands solely as a means of getting to public lands, cannot reasonably be said to be in the case.

On the trial the defendant testified that the corner-stones of the government survey were not discoverable, except with much difficulty, and then in only a few instances. After the commencement of this suit both parties independently employed surveyors to make a survey of the territory over which the dispute arose. The Cosgriff survey was begun about December 12th, nearly a month after the suit had been instituted. Mr. Thomas Cosgriff testified that their survey was made to determine which was government land, and to also determine the lands which Miller said he had leased, so that they might graze the government lands and keep off those claimed by Miller.

The surveyors employed respectively by plaintiff and defendants were examined as witnesses to show on the one side that the corner-stones were all, or nearly all, present, and on the other hand that several of them were either gone or in bad condition, or only to be discovered after diligent search by one accustomed to such matters. However, it appears

that no effort was made on the part of defendants in November to discover the corner monuments, except that one of them testifies that they endeavored to secure the services of a surveyor to make a survey of the ground, but were unable to obtain one at that time.

The plaintiff did not set up any distinguishing marks to identify or indicate the corners or boundaries of his lands, and it seems that not until a survey was subsequently made for him did his foreman know the number of the section upon which he found the sheep of defendants on the 2d of November.

[221] We think the conclusion to be legitimately drawn from the testimony is that the defendants, at least as early as the 2d of November, knew, as did Miller and his foreman, in a general way, the vicinity wherein were located the lands leased by Miller. Although neither party would have known without an examination of the stones marking the government survey which were government and which were Miller's lands, yet they knew that within the scope of country where the sheep were being grazed during the fore part of November the odd-numbered sections were those claimed by Miller. Their lack of knowledge pertained simply to the matter of the identification of the odd and even numbered sections.

Upon these facts it is maintained on behalf of defendants, who are plaintiffs in error here, that no trespass was committed by them. Counsel insists that "there is no trespass in driving and grazing sheep upon the uninclosed lands of another, and especially where there are no means of distinguishing them from other adjacent and unfenced and unoccupied government lands." The argument is that the common-law rule that one must restrain his cattle does not prevail in this state; that the fence and brand laws are inconsistent with such a rule, and it is said that it being unlawful to fence or use private lands so as to prevent others from having access to government lands interspersed therewith, the public have a right of way over such private lands. It is also contended that there was no intent on the part of defendants to trespass upon the lands of the plaintiff; but that they desired and proposed only to graze the public lands, and could not know, and did not know, that they were on private lands, there being nothing to distinguish them. We have already indicated our idea somewhat as to the effect of the evidence upon this matter of knowledge and intent. It

might be conceded that defendants had no specific intent to enter upon and depasture Miller's lands; but we are of the opinion that it must be taken as one of the established facts in the case that, as the boundaries of Miller's lands were not marked, and they were not inclosed, in order that they [222] might obtain the benefit of the grasses on the public domain, the defendants assumed the right, under the circumstances, to graze and depasture all the lands indiscriminately, and that they did so, it being considered by them that it was not their duty to ascertain which were and which were not government lands.

Counsel for plaintiff below, defendant in error here, admit that the common-law rule is inapplicable to our conditions and does not prevail here. They, however, maintain that the right to recover is not based upon the common-law rule, but depends upon a different principle. While it is conceded that one is not liable for trespass committed if his cattle running at large stray upon unfenced premises, it is contended that where cattle or sheep are driven intentionally and persistently upon the uninclosed lands of another, against his will, a trespass occurs, for which he may recover.

In this western country, where the native grasses are adapted to the growth and fattening of domestic animals, it is a firmly settled rule of law that no trespass is committed when animals lawfully running at large wander upon and depasture the uninclosed lands of a private owner. That principle was alluded to in State v. Johnson, 7 Wyo. 512, 54 Pac. 502, and Hecht v. Harrison, 5 Wyo. 279, 40 Pac. 306.

The rule, however, does not go to the extent of permitting the owner of cattle or sheep to willfully and knowingly drive them upon the premises of another, although uninclosed; and there is nothing in our statute relating to fences conferring such a privilege, or rendering uninclosed lands of a private owner, in opposition to his will, common pasture ground for the public. It is generally held that one has no right to drive his animals upon such ground against the consent and expressed will of the owner.

In Delaney v. Errickson, 11 Neb. 533, 10 N. W. 451, it was said: "We know of no law requiring as a condition to one's right to the exclusive enjoyment of his own estate as against the willful, injurious acts of others, that he shall keep it inclosed by a [223] fence": See, also, Powers v. Kindt, 13 Kan. 74; Williard v. Mathesus, 7 Colo. 76, 1 Pac. 690; Monroe v. Cannon, 24 Mont.

316, 81 Am. St. Rep. 439, 61 Pac. 863; Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. Rep. 477; Harrison v. Adamson, 76 Iowa, 337, 41 N. W. 34.

In the case last above cited the court said: "There is nothing to be found in the statutes in this state, or the decisions of this court, depriving the owner of uninclosed land of the profits of the grass and pasture thereon, and exempting one who, against his consent, appropriates the grass or pasture from liability to the owner. The laws of the state provide that trespass is not committed when cattle which are running at large enter upon uninclosed land. But it is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employé and agent of their owner are driven and kept upon uninclosed land against the will of the land owner, and with full knowledge of the owner of the cattle. In that case the trespasser takes and appropriates the use of the land for pasture, and is held by the law liable therefor."

In Monroe v. Cannon, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863, about ten sections of land were inclosed by fence. Some of the land belonged to the parties who had constructed the fence, and a portion was a part of the public domain. One hundred and twenty acres was owned by another party, the plaintiff, who had irrigated it and was raising hay thereon. Plaintiff's land was not separately inclosed, but its boundaries were marked by post holes, by ditches, and by stakes placed at intervals along the exterior limits of the land. The parties who had built the fence, and owned some of the land in the inclosure, had a herd of sheep therein, and at their instance, and against plaintiff's protests, the sheep were driven upon and depastured plaintiff's small tract, and the grass thereon was eaten up and destroyed. The suit was brought to recover for the pasturage. Plaintiff's right to recover was upheld, as against the contention that no recovery could be had by reason of the absence of a lawful fence inclosing the premises depastured.

224 The case of Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. Rep. 477, presented the following state of facts: One hundred and sixty-eight thousand three hundred acres of land in Texas belonging to Phelps were inclosed, together with one hundred and sixty-two thousand two hundred and seventy acres, located in school sections, in one continuous tract of land. The school sections and those owned by Phelps alternated. Lazarus

secured a lease of the school sections from the state. His own stock was pastured in the inclosure, and, in addition thereto, he contracted to and did pasture therein some six thousand five hundred head of cattle for other persons. The stock was not confined to his own land, but grazed upon the land of Phelps as well; and the evidence was undisputed that the entire tract was overstocked. In no other way did Lazarus prevent Phelps from taking possession of his lands or from grazing stock thereon. Phelps brought suit to recover the rental value of his lands, and secured a verdict awarding him eight thousand four hundred and seventeen dollars. The judgment thereon rendered in the circuit court of the United States for the northern district of Texas was affirmed by the supreme court.

In commenting upon the general rule prevailing in the newer states of the west, as well as in Texas, to the effect that the entry of animals at large upon uninclosed lands does not amount to an actionable trespass, the court by Mr. Justice Brown said: "It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle." It was held that the acts of defendant exhibited an intent on his part to avail himself of the pasturage of the lands of the plaintiff; and an instruction was upheld to the effect that if defendant had overstocked the inclosure he should be held liable for the rental value of the lands, evidently upon the [225] theory that by overstocking the land the owner of the cattle must have known that they would graze the tracts belonging to plaintiff, and intended that they should do so. In that case, it is to be observed, there was no separation of the lands of plaintiff from the school sections, nor does it appear that they were even designated or identified upon the ground by marks of any description.

Upon reason and authority, we are of the opinion that if one, knowing uninclosed lands to be the property of another, deliberately and intentionally drives his stock thereon, and depastures the same, over the protests or against the expressed will or consent of the land owner, the one so acting is guilty of an

actionable trespass, and is liable in damages for the injury done. In the case at bar the claim is made that defendants did not know the Miller lands; but the fact is that they knew the tract grazed over was divided into alternate odd and even numbered sections, and that Miller had leased and claimed all the odd-numbered sections. The only basis for their claim of ignorance as to the lands of plaintiff is their inability to identify them, or distinguish them from the even-numbered sections by any artificial markings. There might have been some force in this contention of defendants, had they put forth any reasonable effort to ascertain the location of the public lands, and honestly and prudently endeavored to confine their sheep to such lands. Had they done that, it is quite possible that they might have avoided liability for any accidental depasturing of a portion of plaintiff's lands caused by the absence of anything to indicate the lines between the alternating sections; had they believed at the time that they were upon government land, with no intention whatever to invade the premises of the plaintiff.

But the defendants were not endeavoring to confine their sheep to government land. The sheep were driven and grazed upon all the lands, private and public, indiscriminately, without the slightest steps being taken at the time to determine which were the government sections; and, in [226] fact, all of the nineteen sections of Miller in the tract described were depastured. We are unable to avoid the conclusion that the facts disclosed an intention to occupy and depasture all the lands in the tract involved in the testimony, including the lands of plaintiff.

It is true that defendants, in common with others, were privileged to graze their herds upon the grasses growing upon the alternating public sections. But that privilege was no greater, to say the least, than would have been their right to enjoy the even-numbered sections, had they owned them. It can hardly be contended that, had defendants owned the even-numbered sections, they could have deliberately depastured the odd-numbered sections, because the owner thereof did not inclose them or mark their boundary lines in some manner. In such case, upon what principle could it be held that the duty of marking the boundary lines devolve upon the owner of the odd-numbered rather than upon the owner of the even-numbered sections?

We are not aware of any law that would have made it the duty of either party to have inclosed their lands or to have indicated the boundaries by marks of any description upon the

ground. Nor are we aware of any law that, had either party failed to have inclosed his lands or marked the boundaries, would permit the other to intentionally and knowingly invade his premises and destroy the crops or grasses growing thereon.

Where there are no natural or artificial means of identifying the lines between various tracts, no doubt one would be held blameless if, in the absence of negligence or want of proper precaution, his stock should be driven upon the land of another without his knowledge, and in the pursuit of an honest endeavor to keep them upon his own premises, or ground upon which he has a right to keep them. We perceive no error, therefore, in the giving of the instructions complained of on this question, nor in the refusal of those requested by defendants.

The remaining questions relate to the matter of damages. 227 At the request of the plaintiff, the court gave three instructions, numbered respectively eleven, twelve and thirteen, respecting the damages that might be awarded, should the jury find for the plaintiff.

In substance, they instructed the jury that they should assess the damages they found plaintiff incurred by reason of the trespass from the evidence, and that the amount of actual damages should be such as are supported by the evidence; and, that, in addition to actual damages, exemplary damages might be awarded, in case, as stated in the eleventh instruction, they should find the trespass to have been committed in a wanton, willful and reckless manner, or, as stated in the twelfth instruction, in case they find such trespass to have been committed wantonly, recklessly and without due regard for the rights of plaintiff, or, as stated in the thirteenth instruction, if they should find that the trespass was from any bad motive, or so recklessly as to imply a disregard of society obligations or the rights of plaintiff. The purpose of the exemplary damages was stated to be the punishment of defendants, and a warning or example to others to defer them from similar wrongs. As to the amount of such exemplary damages, the jury were instructed that it might be such as, in the discretion of the jury, they should deem just and proper under the circumstances, and sufficient, considering the financial ability of defendants, to justly punish them and serve as a warning to others.

At the request of defendants, the jury were instructed that if they should find that defendants trespassed upon the lands of plaintiff in the assertion of a supposed right and without

wrong intention, and without such recklessness as to show malice or conscious disregard for the rights of others, then they would not be justified in giving punitive or exemplary damages. Also, that to authorize exemplary damages, the jury must find that defendants trespassed upon the land of plaintiff, and that he was damaged thereby, and, further, that the trespass was done wantonly, willfully, maliciously or with intent to injure plaintiff's property, or deprive him of [228] its use. Also, that if the trespass was without wrong intention, but in the belief that they had a right to go upon the lands with their sheep, and that the acts were done without malice or willful intention to injure the plaintiff, then the jury should assess only such damages as they should find from the evidence to have been actually sustained prior to the bringing of the suit. Also, that exemplary damages cannot be given, except in extreme cases, where the malicious intention to willfully injure has been clearly shown, and that, unless the same has been proven, to the satisfaction of the jury by a preponderance of the evidence, no sum whatever as punitive, vindictive or exemplary damages can be awarded. At request also of defendants, the jury were further instructed that the plaintiff was not entitled to any damage, either as compensation or otherwise, for any trespass other than that alleged in the petition, nor for any trespass occurring since the commencement of the action.

The court, however, refused to instruct the jury as requested by defendants to the effect that any portion of the damages claimed by plaintiff occurring since the commencement of the suit, such as the death or loss of sheep, should be disregarded, and that the damages should be limited to matters and things occurring prior to the institution of the suit. The court also refused to charge that if plaintiff was entitled to recover at all, the measure of his damage would be such amount as would compensate him for the damage actually sustained by reason of defendants' acts, which occurred prior to the commencement of the suit. This instruction, as will be observed, positively eliminated the question of exemplary damages.

With respect to damages purely compensatory, the instructions were confined to informing the jury that the amount should be such as was shown by the evidence to have been actually sustained.

Neither party requested a more definite statement. The defendants not only did not request an instruction stating more

definitely the legal measure of compensatory damages, [229] but they are not now complaining of the absence of such an instruction. They did not by any instruction present the question of the right of the jury to consider any of the evidence as to the loss or amount of damages, except in so far as the damage or loss claimed might have occurred subsequent to the commencement of the suit; such, for instance, as the loss of sheep, which was specifically referred to in one instruction refused, in connection with the statement that anything occurring after suit brought should be disregarded. But by no instruction did defendants ask to have the jury informed that the loss of sheep, or any other item of damage testified to, could not be considered, because too remote, or for any other reason, except that it might have occurred after the suit had been commenced.

The instructions as to actual damages sustained must have referred to and covered the items of loss or expense, which had been admitted in evidence, so far as the jury should find them to be supported by the evidence in the case. The jury must have so understood the instructions. It is now contended on behalf of plaintiffs in error that none of the proof as to damage was proper; that all the damages shown by the evidence were of the character known as special, and were not recoverable, for the reason, as contended, that no allegation thereof or claim therefor was contained in the petition, and, further, as to a portion of the damage claimed, that it was too remote.

The defendant in error, Miller, and his foreman, Wagers, were the only witnesses examined upon the subject of damages. The witness Wagers was permitted, without objection, to state the amount of damage suffered by Miller by reason of Cosgriff's sheep grazing off his sections of land, and he stated the amount to be about nine thousand four hundred dollars. But the items going to make up the amount were shown in detail by the testimony of the two witnesses, and it is not difficult to ascertain how the aggregate sum mentioned by Wagers was arrived at.

The evidence shows that Miller had fifteen thousand head [230] of sheep, and intended to use the lands in controversy for winter pasturage; and it was an admitted fact in the case that all the other sheep ranges in the vicinity, not owned or controlled by Miller, were either leased by defendants or others, or occupied by others engaged in the sheep industry.

It appears from the testimony that during the winter succeeding the trespass, and on account of such trespass, Miller was obliged to remove two herds of his sheep, comprising about five thousand head, to his ranch to be fed hay, and that they were fed two hundred and twenty-five tons, worth ten dollars per ton; that such feeding was continued for a period of eighty-five to ninety-five days; and required the services of two four-horse teams and two extra teamsters, at an expense of six dollars per day for the teams and fifty dollars per month, inclusive of board, for each extra teamster. The testimony is positive that this expense was required because the nineteen sections in question had been depastured by the Cosgriffs. A rough computation will show that such expense amounted to something in excess of three thousand dollars.

The remaining actual damage, as shown by the evidence, was the loss of fifteen hundred head of Miller's sheep, worth four dollars a head, from the other herds, which were removed to other ranges, evidently at some distance from the lands involved in this action, or at least not in the immediate vicinity thereof. The witnesses claimed that the loss of the sheep was due directly to their lack of feed occasioned by the depasturing of the lands in controversy. The sheep were not removed until they had been pastured upon other lands of Miller, described in the petition, but not embraced in the trespass shown upon the trial.

Upon cross-examination, and also by independent testimony, the defendants sought to show that the loss of the sheep was caused by the unusually severe winter. Upon that question the most that can be said is that the evidence is conflicting respecting the character of the winter in that locality. Some of the witnesses produced by defendant thought that the winter was more severe than the previous one, but Miller [231] and his foreman did not so consider it. No witness other than plaintiff and his foreman attempted to state the cause of the loss of the sheep. Defendant's witnesses were examined only as to the severity of the winter, and necessity in general for other provision for sheep than the native grasses, and the condition of the Miller lands claimed to have been eaten off by the sheep of defendants. There may be said to be some conflict as to the condition in which the trespass of defendants left the premises of plaintiff. That matter, as well as every other matter of fact as to which the evidence was conflicting, was submitted to the jury; and with their determination thereon this court, of course, could not interfere.

There was no direct evidence as to the value of the grass destroyed through the trespass of defendants, nor any other evidence of the damage suffered thereby by the plaintiff, except that above mentioned. Plaintiff and his foreman, however, testified that the lands trespassed on were good grazing lands, and that the feed growing thereon before the trespass was good.

It is contended in this court that the evidence as to damage related to special damages only, and was not admissible, and cannot be considered, for the reason that the petition did not allege any special damages.

In the first place, it is to be observed that the evidence complained of was all admitted without objection. It is true that when Mr. Miller was being examined an objection was offered on the ground that no trespass had then been shown, and that it was anticipating evidence. The court stated that witness might testify, but if the trespass was not afterward shown, the testimony might be stricken out. The witness Wagers, by whose testimony the trespass was established, had not at that time been examined. No other objection than that above mentioned was made to any of the evidence upon the subject of Miller's loss or damage. Nor was any motion offered to have the testimony stricken out or taken from the consideration of the jury, nor any instruction upon the point of its competency or materiality requested. On [232] the contrary, during the trial defendants sought to overcome its effect by producing evidence tending to show that the losses and expense testified to resulted from causes independent of the trespass.

It is no doubt the general rule that to be proven special damages must be alleged; but when evidence showing such damages has been admitted without objection, a complaint on the ground that the allegations of the petition are insufficient to cover special damages comes too late after verdict. Indeed, it is held that proof of special damage, if not objected to when offered, cannot be ruled from the jury by an instruction, after the evidence is closed, and furnishes no ground for a new trial: See Lashus v. Chamberlain, 6 Utah, 385, 24 Pac. 188, where the principle is fully discussed and the authorities reviewed: Plunkett v. Minneapolis etc. Ry. Co., 79 Wis. 222, 48 N. W. 519.

Moreover, it is not clear that sufficient foundation for the proof of such damages, at least as to the expense of feeding hay, is not laid in the petition. It is averred that the plaintiff is the owner of more than fifteen thousand head of sheep, and

that he had preserved the grasses upon said lands for the purpose of grazing said sheep thereon "during the coming winter season, to wit, from now until May, A. D. 1899, in order that said sheep might have the sustenance and nourishment during the winter months," and "that the depasturing of the said lands all grazed over by defendants' sheep have destroyed a large portion of the value of said lands for grazing during the coming winter; that the other ranges for sheep in the vicinity of the said lands of plaintiff are either leased by defendants or others, or occupied by others engaged in the sheep industry." Then follows in the same paragraph an averment that the trespass was willful and malicious, and with the desire to cause plaintiff's sheep to be devoid of sustenance during the winter, whereby they might die, "by which said acts of defendants in said mischievous, negligent and malicious manner the said plaintiff has been damaged in the sum of twenty-five thousand dollars." It [233] should be stated, perhaps, that plaintiff's lease for the lands ran from May 1, 1898, until May 1, 1899; hence, by the trespass under his claim that the grass was entirely depastured, he was practically deprived of all benefit of his lease.

It was held in Plunkett v. Minneapolis etc. Ry. Co., 79 Wis. 222, 48 N. W. 519, that if the allegation as to special damages was uncertain or indefinite, the objection should have been made by a motion to make more definite and certain. We think it unnecessary to hold positively the allegation in this case to have been sufficient in the face of a timely objection, had one been offered. It is clearly sufficient, under the circumstances, the evidence having gone in without objection.

There is another view which might be taken of the testimony with respect at least to the expense of feeding hay to the sheep at plaintiff's ranch. We are inclined to the opinion that it was admissible as evidence of the value of the pasture destroyed, and the damage to plaintiff's possession, under the general allegation of damage, as a consequence of the admitted fact that there were no other available sheep ranges in the vicinity. There being none, it would hardly have been possible to show the damage in any other way. If there were no other ranges in the vicinity, then other pasture lands there could not have been obtained, and the pasturage, or the growing grass, could not be said to have had a market value. The usual method of establishing value or damage would have been inapplicable: Gilbert v. Kennedy, 22 Mich. 117. In that case Mr. Justice Christiancy, delivering the opinion of the court, said in a somewhat

analogous case: "There can be no rule of law founded upon any just or intelligible principle which, in actions of trespass at least, requires any higher degree of certainty in the evidence upon which the damages are to be estimated than in reference to any other branch of the case. Juries in such cases have as much right, and it is as clearly their duty to draw reasonable and proper inferences from the facts and circumstances in evidence, in reference to the [234] amount of damages, as in reference to any other subject of inquiry in the case. And in those cases of trespass, or those features of a particular case, where, from the nature of the case, adequate damages cannot be measured with certainty by a fixed rule, all the facts and circumstances tending to show such damages as are claimed in the declaration, or their probable amount, should be submitted to the jury to enable them to form, under proper instructions from the court, such reasonable and probable estimate as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing any part of the loss upon the injured party, which the jury believe from the evidence he has sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages and throw the loss upon the injured party, would be little less than legalized robbery."

The evidence of plaintiff, together with the fact that the other ranges in the vicinity were occupied, rendered it clear, if accepted by the jury, that the expense of feeding hay was the direct result of the trespass; and such expense was admissible, we think, under the general allegations of actual damage, caused by grazing the grass off of the plaintiff's pasture ground.

It is insisted, however, that plaintiff cannot recover for any item of damage occurring after the commencement of the suit.

The rule on that subject is thus stated by Sutherland: "It is not essential, however, that all the injurious effects of the act which constitutes the cause of action should have been developed and suffered before suit; it is immaterial to the right to recover for them where the effects manifest themselves, with reference to the time of bringing the suit. But it is practically material to the plaintiff that the effects [235] be so manifest, before and at the time of the trial, as to be susceptible of proof.

The actual effects down to the time of the trial are provable; and, whether those which may ensue later may be taken into account will depend on whether they are imminent and sufficiently certain. Whether continuing damages may be computed, after the commencement of the suit, will depend on whether they proceed from the act complained of in that suit as the cause of action, or whether they proceed from some later act constituting a fresh cause of action": 1 Sutherland on Damages, 187, 194; Hayden v. Albee, 20 Minn. 159; Filer v. New York Cent. R. R. Co., 49 N. Y. 42; Spear v. Tracy, 26 Vt. 61; Schlitz Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92, 32 N. E. 693; Miller v. Wilson, 24 Pa. St. 114.

The evidence admitted to prove the damages plaintiff had sustained had reference to those injuries suffered on account of the trespass alleged in the petition. The damages claimed to have ensued proceeded, according to the evidence of plaintiff, directly from the acts constituting the cause of action sued on.

We do not regard it as necessary to the disposition of this cause that we decide whether the damage by loss of sheep was too remote or not. That matter not only went to the jury without objection on that ground, but for other reasons it is immaterial to a conclusion upon the whole case. It is impossible to say whether the jury included the loss of sheep or not in their verdict. They awarded damages in the sum of six thousand five hundred dollars. Had they allowed the plaintiff all the actual damages shown by the testimony of his foreman and himself, inclusive of the damage occasioned by the death of fifteen hundred head of sheep, the verdict would have approximated the sum of nine thousand dollars. Assuming that exemplary damages were proper, and those probably allowed not excessive, it will be seen that error, if any, in regard to the sheep loss, could not be held to have been prejudicial.

But the right to recover exemplary damages is challenged. This court is urged to adopt the principle that the allowance of exemplary or punitive damages is wrong in any case. 226 There are a few states where such a principle is maintained; but by the great weight of authority the doctrine of exemplary damages in proper cases is strongly upheld. The general rule where the doctrine is recognized is, that where malice, fraud or gross negligence or recklessness enters into the commission of a tort, or where the act is done wantonly, exemplary damages are recoverable: 12 Ency. of Law, 2d ed., 13, and cases cited. Sutherland, in his work on Damages, states that the

doctrine that exemplary damages in all actions for torts may be allowed for the purpose of example and punishment, in addition to the compensation, is held in nearly all the states of the Union and in England, and the author cites a large number of cases: 1 Sutherland on Damages, 721, 722. He states the rule in various ways, but the act to authorize the infliction of such damages must, under any statement of the rule, have been done wantonly, recklessly or maliciously. "Whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult; whenever there has been oppression or vindictiveness on the part of the wrongdoer; whenever there is a willful, malicious or reckless tort to person or property": 1 Sutherland on Damages, 716. "If a wrong is done willfully, that is, if a tort is committed deliberately, recklessly or by willful negligence, with a present consciousness of invading another's right, or of exposing him to injury, an undoubted case is presented for exemplary damages": 1 Sutherland on Damages, 724.

Although in some states the courts only allow such damages for those acts which are not criminal offenses, the more general rule is that the liability to criminal punishment does not affect the civil remedy, or the question of punitive damages: 12 Ency. of Law, 2d ed., 11; 1 Sutherland on Damages, 738.

We think, if it be material here, whether the act was a criminal offense or not, which is questionable, that the general rule is the one best sustained by reason, as well as supported by authority. Where the act is punishable criminally the judgment for the act as an offense against the criminal laws is for the wrong done the public, while the damages [237] awarded in a civil action, although punitive and inflicted by way of example and punishment, is for the offense committed wantonly or maliciously against an individual sufferer. As was said in one case, "the liability to both criminal punishment and to such damages as a jury may impose in a civil suit is the consequence of any act that is criminal, and also creates a civil liability": Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197. Exemplary damages in a civil action are not awarded in lieu of punishment. They are spoken of as awarded by way of example or punishment, for the reason, it seems to me, that they are based wholly upon the wantonness, maliciousness or recklessness of the act, and are not given as a substitute for compensatory damages; and are allowed in favor of a private

suitor, because he has been the victim of the wanton, malicious or reckless act.

We entertain the opinion that the doctrine of exemplary damages is not only thoroughly engrafted upon the jurisprudence of this country, but that it is a salutary one, and we are not prepared to hold that it should not be allowed in proper cases in this state. Although the question has not, perhaps, been heretofore squarely decided in this court, we believe the principle has been usually recognized in the district courts of the state, and at an early date the supreme court of the territory expressed a recognition of the rule in cases of personal injuries, committed through wantonness, or even gross carelessness, but it was said that there should be clear and unmistakable evidence of an intention to do the personal injury before the jury would be justified in finding an amount greatly beyond the actual loss sustained by the person injured: Union Pac. R. R. Co. v. Hause, 1 Wyo. 27.

We think the evidence justified the giving of instructions relative to exemplary damages. According to the testimony of Wagers, after he had driven the sheep off of the premises of plaintiff several times, they were in each instance driven back; and then defendants "put out armed men," and their employés told Wagers they had instructions to [238] kills everybody bothering the sheep, whether on Miller's land or the land of anyone else.

At the time of giving the second notice to the defendants, one of them said to Wagers that Miller had the law, and their sheep were down there and could not be moved. It is explained by the one making that remark that what was intended thereby was that Miller could resort to law. Wagers also testified that, at the same time, one of the defendants said they would take their sheep to feed "wherever it may be."

Mr. Thomas Cosgriff admitted by his testimony that they had sent armed men into the territory in question, and explained the matter by saying they had sent herders and always furnished them with guns, if they had none of their own, for their own protection, and "the protection of the herds against the depredations of wolves in any form."

It has already been shown that defendants, notwithstanding the notices from Miller, insisted upon grazing their sheep on all uninclosed lands. This is not a case where defendants claimed any ownership in the lands leased by Miller. Had they done so in good faith, upon some reasonable foundation,

a different question would have been presented. The right they claim, and doubtless it was claimed in good faith, was to depasture not their own premises, but those of another. That sort of claim, although preferred in good faith, under a mistaken notion of the law, cannot be regarded as a claim of right sufficient to absolve a trespasser from liability to exemplary damages, where the case otherwise is such as to warrant their infliction.

It is impossible for us to know what portion of the damages, if any, was based upon the evidence as to loss of sheep. The expense of feeding hay approximated three thousand dollars, and the remainder of the amount of the verdict, viz., three thousand five hundred dollars, is not enough to cover the value of the sheep claimed to have died in consequence of the trespass. Some or all of that amount may have been assessed by way of exemplary damages; and if so, we are not prepared to hold it to be excessive.

239 It is not apparent, therefore, how the question now raised as to the remoteness of the loss of sheep as an item of damage becomes material on this appeal. The trial court did not rule upon the matter, and was not requested to do so. The evidence went in without objection, and no suggestion seems to have been made on the trial that it was not competent or entitled to consideration.

We do not think the court erred in its instruction, or its refusal to instruct as requested in relation to damages. Neither do we think that error was committed in the admission of testimony respecting the financial condition of the defendants. Over their objection one of the defendants, called as a witness by plaintiff, was required to answer a general question concerning the aggregate wealth of the defendant firm and its individual members. He stated that he guessed it to be two or three hundred thousand, and that it might perhaps be three hundred thousand.

In cases of tort where exemplary damages are claimed, it is proper to inquire into the pecuniary condition and circumstances of the defendant, the ground upon which such testimony is held admissible being that a given sum would be a much greater punishment to a man of small means than to one possessing larger wealth: 1 Sutherland on Damages, 744, 745; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Dailey v. Houston, 58 Mo. 361; Hayes v. St. Louis R. R. Co., 15 Mo. App. 584; Belknay v. Boston etc. R. R. Co., 49 N. H. 358; Hayner v. Cow-

den, 27 Ohio St. 292, 22 Am. Rep. 303; McCarthy v. Niskren, 22 Minn. 90; Mullin v. Spangenberg, 112 Ill. 140; Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060.

We cannot substitute our judgment for that of the jury as to the amount of damages. In view of all the evidence, we perceive no sound reason for holding the assessment of damages excessive, so as to require a vacation of the verdict on that ground.

We are constrained to hold that there is no error in the record, and, therefore, the judgment must be affirmed.

Corn and Knight, JJ., concur.

While the Owner of Livestock is not ordinarily liable for their ranging on the uninclosed land of others, the case is otherwise when he willfully herds his stock on such land against the owner's wish and consent: See the monographic note to Monroe v. Cannon, 81 Am. St. Rep. 449.

Exemplary Damages are discussed in the monographic note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep. 870-883. A reference to page 882 of this note will show that according to the weight of authority the fact that a defendant may be or has been punished in a criminal proceeding does not deprive the party injured by a criminal tort of his right to exemplary damages. That evidence of the wealth of the defendant is admissible in determining the amount of punitive damages, see the note to Ross v. Hixon, 26 Am. St. Rep. 164.

HARTNEY v. GOSLING.

[10 Wyo. 346, 68 Pac. 1118.]

MINING PARTNERSHIPS—Authority to Borrow Money.—In a purely mining partnership, one partner has no implied power to borrow money on the credit of the firm. (p. 1012.)

MINING PARTNERSHIPS.—Parties May be Tenants in Common of mining property without constituting a mining partnership. (p. 1012.)

MINING PARTNERSHIP Exists Only when the cotenants or co-owners of the property unite and co-operate in operating or working the mine. (p. 1012.)

MINING PARTNERSHIPS.—Implied Power of a Partner in a mining partnership as to third persons does not extend further than to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management and ecurse of the business. (p. 1013.)

MINING PARTNERSHIPS may be Created not only by the express contract of the parties, but also by their acts. (p. 1013.)

MINING PARTNERSHIPS—Authority of Partner to Contract Debts.—If, in consideration of an interest in whatever might be discovered, persons furnish another with a certain sum of money to prospect for mineral, and agree during his absence to give his family a certain sum of their support, but there is no agreement for further advances, such contract does not obligate the parties, as mining partners, to pay an additional debt incurred by the prospector for money and provisions not used in developing or working a mine in which all of the parties co-operate. (p. 1016.)

MINING PARTNERSHIPS—Authority of Partner to Contract Debt—Evidence.—If one has merely agreed to provide, and does provide, a definite sum of money to another to use in prospecting for mineral, in consideration of sharing in whatever is found, he does not, by such act alone, become bound for all expenses incurred by such other for personal supplies after, or even before, the sum originally furnished has been exhausted, and, in such case he is entitled to testify to the want of authority in the prospector to borrow other money or contract debts on the individual liability of the witness. (p. 1016.)

MINING CONTRACT—Authority to Incur Debt—Evidence.—If one person furnishes another with a definite sum of money to be used by the latter in prospecting for mineral in consideration of a share in whatever may be found, proof of a letter written by him to the prospector authorizing the latter to incur an additional debt, and stating that he would be responsible therefor, is admissible in favor of one who furnishes the prospector with personal supplies on the strength of the letter. In such case proof of the letter is competent evidence to show that the writer thereof held himself out as a partner of the prospector, and, as such, authorized the debt thus incurred. (p. 1017.)

MINING CONTRACT—Authority to Incur Debt—Evidence.—If several persons furnish another with a definite sum of money to be used in prospecting for mineral, in consideration of a share in whatever is discovered, proof of a letter written by one of such

persons to the prospector authorizing him to incur an additional debt, and stating that the writer and his associates would be responsible therefor, is not admissible against such associates, without proof that they knew of, authorized or assented to such letter. (p. 1017.)

PARTNERSHIP—Individual Liability.—If several are sued as partners, and part of them only prove to be liable, judgment may, under the statute, be rendered against them, and in favor of the others, whether the action be one in contract or in tort. (p. 1018.)

PARTNERSHIP—Individual Liability—Evidence.—If several persons are charged with liability as members of a partnership, evidence is admissible to show that one of them alone by his acts or admissions held himself out as a partner of the one who incurred the debt sued on, and so acting individually authorized such debt. (p. 1018.)

PARTNERSHIP—Individual Liability—Evidence—Variance. Evidence that one of several persons sued as partners, held himself out as a partner and as such individually authorized the debt sued on is not a fatal variance from a complaint alleging that the defendants incurred such debt by members of a partnership. (p. 1019.)

J. H. Chiles, T. S. Taliaferro, Jr., and C. M. Watts, for the plaintiff in error.

[350] POTTER, C. J. The plaintiff in error, Thomas Hartney, brought suit against C. H. Gosling, Dennis D. Waters, John Hartney, H. H. Edgar, John Park, and George L. Young, alleging that said defendants composed a partnership, and that at their special instance and request, on or about February 25, 1899, he loaned the defendants the sum of five hundred dollars, which they promised to repay to him, that no part of the said sum has been paid by defendants or either of them and that there is due to plaintiff from the defendants and each of them upon said account the said sum with interest. A statement of an account is attached to the petition, and referred to therein, containing one item only, viz.: "February 25, 1899. To money loaned and advanced, five hundred dollars."

Of the defendants named in the petition, three only, Gosling, Keenan and Park, appeared and answered. Their answer was a general denial. The case was tried to the court without a jury upon the issue thus framed and the finding was general in favor of the answering defendants, and the judgment was that plaintiff take nothing, and that the said defendants have and recover their costs from the plaintiff. [351] A motion for new trial was overruled, and plaintiff prosecutes error.

The errors alleged in the petition in error are that the court erred in overruling the motion for new trial and in rendering judgment in favor of the defendants for costs. The grounds for new trial contained in the motion are that the decision of

the court is contrary to law, and not sustained by sufficient evidence; and that said decision is contrary to both law and the evidence; and that the court erred in excluding certain evidence therein set out offered by plaintiff, and admitting in evidence certain testimony therein also set out offered on the part of the defendants. These matters of evidence in respect to which it is charged that error was committed will be pointed out more specifically as we proceed.

The dealings out of which this suit arose occurred in Alaska between the plaintiff and George L. Young. The plaintiff provided Young with some money and provisions, and it is claimed that the circumstances were such as to place the defendants, as members of a mining partnership, under a legal obligation to reimburse the plaintiff therefor.

Prior to the departure of Young for Alaska, a written agreement was entered into between him and the other defendants. That instrument having been lost, evidence was introduced to show its contents. Young, Keenan and Park were each examined in relation to the agreement, and there is but little practical conflict in their testimony. Young was to proceed to Alaska and prospect for gold, and anything found by him was to be owned by the defendants in the following proportions: Young was to own three-tenths, Gosling two-tenths and each of the others one-tenth. He was furnished with seven hundred dollars by the other defendants, each one paying one hundred dollars, except Gosling, who paid two hundred dollars. In addition thereto they agreed to furnish to the family of Young, for their support during his absence, the sum of fourteen dollars per month, and the agreement in that respect was complied with.

352 Young testified that if he found a mine containing gold he was to develop the mine and dig out the gold. He did not state in so many words that the agreement contained a provision to that effect, but when asked what he was to do if he found gold, he replied that he was to dig it out; and he gave an affirmative answer to the question inquiring if he was to develop the claim. It is doubtless to be understood from his testimony that he construed the agreement as requiring him not only to prospect for a mine, but if one was found to develop and work it for the joint benefit of all the parties. Nevertheless, that may have been merely his construction of an agreement that he should go to the country mentioned and prospect for the joint advantage of himself and those furnishing

the money. Mr. Keenan testified that there was nothing in the agreement about developing and working a mine, if one should be discovered.

On his examination in chief, Young gave his recollection of the agreement as follows: "As far as I understood, the contents of the agreement was, they furnished me with money, and they was to pay my family while I was away fourteen dollars per month, and if I found anything they were to each have one share, and I was to have three shares of whatever I might find." On cross-examination, he assented to the following statement of the written contract: "That in consideration of seven hundred dollars furnished to you, and the further consideration of fourteen dollars a month to be furnished to your family for one year, that you agreed to go into Alaska and prospect for gold, and if properties were found, that you was to receive three-tenths and each of the others one-tenth?" He was then asked if the seven hundred dollars was not all the other parties agreed to furnish outside of the monthly payment to his family, and he replied: "That is all that I understood." It elsewhere appears that as Mr. Gosling paid in two hundred dollars, he was to be entitled to two shares.

Mr. Park's version of the agreement was that Mr. Young was to go to Alaska to prospect, and if anything was found [353] he was to have three-tenths, Gosling two-tenths, and the witness one-tenth. Mr. Keenan stated the contents of the agreement to be "about as follows": "Mr. Gosling put up two hundred dollars. The balance of those named put up one hundred each, which made seven hundred dollars. George Young was to have three-tenths of whatever was found and Mr. Gosling two-tenths, and those that put up one hundred each one-tenth. We were to pay a certain amount for the support of his family. The exact amount I don't remember, but I know I paid it."

The agreement seems to have been made in July, 1897, at Rock Springs, in this state, and Young arrived in Alaska sometime in that year. Just when he arrived is not shown, but from incidental references in the testimony it is probable that he proceeded to that country very shortly after the date of his agreement. He states that while there he located a claim and sunk two shafts in it, from twenty-four to thirty feet, but he found nothing in them, and seeing that it was a failure, he left it. He says it took from six to twelve months to do the work, but it is not clear whether he intended

to state that the sinking of each shaft or both shafts occupied that much time, and it is probably immaterial. From a consideration of all the testimony, it is quite impossible to understand at what particular time during his stay in Alaska the above-mentioned work was done. Had the evidence on that matter been more definite it might have simplified the question. He met Hartney, the plaintiff, who had preceded him to Alaska, in February of the following year, 1898, and it is reasonably clear that during some of the period succeeding their meeting they were engaged in prospecting and in traveling for that purpose; and hence after February, 1898, Young was not engaged solely in the work referred to upon the claim which he located and afterward abandoned. He does not state, in regard to that claim, that it was located in the names of the defendants, nor does he or any witness give any information as to whose names were used in locating it. It may be assumed, however, that he held the claim for all the parties.

[354] What disposition was made of the seven hundred dollars furnished him is not shown, and it does not appear that he did any other work than that above stated, except that in 1898 he made a prospecting trip, in company with Hartney and two others. We understand the testimony of the plaintiff and Young to show that in February, when Young "came down the creek," the plaintiff advanced him eighteen dollars, and in March he let him have one hundred dollars, with which sum of money Young bought provisions for his own consumption, and the money was furnished for that particular purpose. The plaintiff states that Young was not working and had nothing to eat, and that he loaned him the one hundred dollars to buy provisions with; that he had to go to Dawson, twenty miles below, to buy the provisions, and they lasted him until the plaintiff got through with the cleanup, where he had been working. He states that he then intended remaining another winter, and Young also wanted to remain, and he bought the latter provisions for the balance of the five hundred dollars sued for. He says that the provisions bought for Young, after the loan of the one hundred and eighteen dollars, were bought on the strength of a letter which Young had received from Gosling, one of the defendants. Young had told him about the "company business," and the parties who were interested with him, and the amounts they had respectively furnished him,

and also showed him a letter he had received from Gosling. That letter, however, he had not seen, and he knew nothing about it, if, indeed, it had then been received, when the one hundred and eighteen dollars was advanced.

Before considering the Gosling letter it may be well to refer to some other matters tending to shed some light upon the situation of the parties in connection with the purchase of the provisions in question. It seems reasonably clear that after their purchase, which occurred in July, 1898, the plaintiff and Young remained together, sharing the provisions until February, 1899, when the parties had a settlement, and Young is said to have given a receipt to the plaintiff for five 855 hundred dollars, including the one hundred and eighteen dollars. It is to be understood, we think, that of the provisions which had been bought by plaintiff, and shared with Young, the proper proportion chargeable to the latter was agreed upon between them as three hundred and eighty-two dollars. The receipt was lost, and was not, therefore, in evidence, nor was any testimony offered as to its contents or signature, other than the fact that it was given for five hundred dollars. There does not appear to have been any separation or division of the supplies at any time after their purchase. Plaintiff bought them, and permitted Young to live with him and share them in common with him. No itemized statement was ever made, nor is there any other proof of what was in fact Young's reasonable share of the expense, except the statement of the plaintiff and Young that the amount agreed upon at the settlement was right.

After the purchase of the provisions the plaintiff and Young, with two others, went on a prospecting trip, and it seems from the testimony that during that trip these provisions constituted at least a portion of their means of subsistence. Indeed, nothing is said about any other provisions, and the court is left in the dark as to whether the other parties provided anything or not. On that trip also some of the provisions were lost by the upsetting of a boat. After that Young says that a horse was bought and "other things" to proceed on the trip, and conveys the impression that a part of the expense subsequently entering into the February settlement included the horse and "other things," although no explanation was offered concerning the later disposition of the horse, if any, or what the "other things" embraced.

Young testifies that if anything had been discovered on that trip each of the parties who were with him would have been entitled to a one-fourth interest; and that the defendants here would have had their proportionate share of his one-fourth interest. It is not shown that either of the defendants knew anything about that trip. Before concluding this statement of the situation, and of the acts of Young [356] while in Alaska, it should be added that the testimony fails to specially disclose what the agreement or understanding was, if any, between Young and the plaintiff at the time of the purchase of the provisions in the summer of 1898. Plaintiff testifies that Young and himself went together and bought their "outfit," and that he paid the bill, and kept an account of what they eat together, and in February following the amount owing by Young was agreed upon between them. The account, however, like every other writing concerned in the case, was lost.

It seems that Young received a letter from C. H. Gosling, one of the defendants. That letter he handed to the plaintiff, and it could not be found. The plaintiff offered to prove by the witness Young that at or about and prior to the time of receiving the money sued for he received from Gosling a letter in which the latter authorized and told him, on behalf of the partnership, to borrow money and supplies from the plaintiff, and that he would see that it was paid, and that the partnership would also stand ready and willing to pay the same. In the offer it was stated that the letter was not in the possession of witness, but had been given to the plaintiff. The plaintiff had not then been examined as to its loss while in his possession. An objection to the offer was sustained. Later on the plaintiff testified that he lost the letter, and he stated that in the letter Young was told to borrow money from all he could, and plaintiff's name was mentioned in it, and to stay another winter and prospect, and that the company would be responsible, and that he, the plaintiff, would get his money back. At the conclusion of plaintiff's examination as a witness his counsel again offered to prove by the testimony of the witness Young, "as to the contents of the letter received by him from C. H. Gosling, that it stated for him to borrow money and supplies of Thomas Hartney, and that the company and himself would stand personally responsible, or words to that effect." The offer was denied.

We deem the above reference to the facts sufficient to permit an intelligible consideration of the legal propositions in

[357] the case, although it may become necessary to allude to some particular statements found in the testimony not already mentioned.

It is urged that the judgment is contrary to the law and evidence as between the plaintiff and all the answering defendants, and especially as against Gosling. In this controversy the only right of the plaintiff to be considered is his right to recover from Gosling, Park and Keenan, or either of them, upon the issues made by the pleadings and upon which the action was tried.

To sustain the charge of error in the judgment, counsel for plaintiff contends in the first place that the agreement between Young and the defendants constituted a mining partnership, and that they became mining partners; and it is urged that Young had implied authority, by reason of the fact of partnership, to pledge the credit of all the defendants, as his partners, by borrowing money or purchasing necessaries for carrying on the concern or business.

It is generally and, we think, universally held that in a mining partnership, pure and simple, one partner has no implied authority to borrow money on the credit of the firm: Barringer and Adams on Mines and Mining, 752; 2 Lindley on Mines, sec. 801; Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96. But what is a mining partnership? The definition given by Mr. Lindley is: "Where several owners unite and co-operate in working a mine": 2 Lindley on Mines, sec. 796. And that definition is also given by Barringer and Adams on Mines and Mining, 750.

Parties may be tenants in common of a mining property without constituting a mining partnership. The partnership is constituted when, as such tenants in common or co-owners, they unite and co-operate in operating or working the mine: Nolan v. Lovelock, 1 Mont. 224; Congdon v. Olds, 18 Mont. 487, 46 Pac. 261; Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96; Charles v. Eshleman, 5 Colo. 106; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; Manville v. Parks, 7 Colo. 128, 2 Pac. 212. It is indicated in the case last cited that as a condition to the existence of a mining [358] partnership it is not necessary that the mine be owned by the parties working it, for it is said to be evident that such a partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own

the mine itself. In the cases which have come under our observation the partnership has been held to exist only where there has been co-operation in working or developing mining property. A mining partnership is distinguished from an ordinary partnership by the absence of the delectus personarum which characterizes the latter. In mining partnerships neither death nor bankruptcy of one of the members will dissolve it, nor will a dissolution be worked by the sale of an interest by one of the partners. This principle is largely responsible for the greater limitation upon the implied powers of a partner in a concern of that kind.

The implied powers of a partner in a mining partnership, as to third persons, is not held to go further, we think, than authority to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management and course of the business. In the case of Manville v. Parks, 7 Colo. 128, 2 Pac. 212, the other partners were held liable for a debt contracted by the managing partner, where it was shown that the articles purchased were essential to the carrying on of the business and the accomplishment of the purpose of the defendants in working the mine.

A mining partnership may not only be created by express contract of the parties, but its existence may be deduced from the acts of the parties: Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96. In that case it was said that "in the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the [359] consequences of a commercial partnership." In that case the authorities bearing upon the subject are reviewed and the whole subject learnedly discussed.

In the case before us it is not perceived how the trial court, from the mere acts of the parties, could have found a mining partnership to have existed, so as to confer upon Young implied power to bind the defendants by contracting the debt sued on. The failure of the proof to fix the period when Young was employing his time in sinking the two shafts upon the claim located by him has already been alluded to. It is true that Young stated the money furnished

by Hartney was spent for provisions, etc., before they started out to work the claim, and he responded "Yes" to the question in substance whether the money was expended while he was working the claims, and preparing to work them, in which all the defendants had an interest. And this question was asked Mr. Hartney: "Was he prospecting after he got these supplies and during the time he got them on the claim he got for the company and had been located by him?" And he answered, "Yes, sir." The witness had immediately before stated that Young used the supplies to keep body and soul together while he was prospecting for the company out there. Yet it appears that the provisions were not obtained through the bounty of Hartney until the summer of 1898, after Young had been in the country nearly a year; and after they were obtained he was on a prospecting trip with Hartney and others; and it is apparent that while on that trip he could not have been working on the claim which he testified to having located and abandoned.

We cannot attach to the affirmative responses to the leading questions above mentioned sufficient importance to outweigh all the other facts and inferences to be legitimately derived from the rest of the testimony. The plaintiff had the burden of proof. These defendants, at least Keenan and Park, had not held themselves out as partners of Young; and the evidence fails to satisfy us that Hartney was led into parting with his money by reason of the working of a 360 mine owned by the defendants in common with Young. If he based his right upon the fact that the defendants were joint owners of a mine, and that they were united and had co-operated in working it, he should have shown that fact. To say the least, the evidence upon that matter is so indefinite and uncertain that it furnishes no ground for reversing the judgment of the court.

Even if there was an agreement providing that Young should work a mine when discovered, we think it quite impossible to hold that the court erred in not finding that a mine had not only been discovered, but was being worked by Young in co-operation with defendants, and that the money and provisions provided by the plaintiff were obtained for the purpose of working the mine, and as essential to its proper management in the usual course of business.

But Keenan testified that the agreement contained no provision respecting the work or development to be done upon a

mine, should one be discovered; and in stating the contents of the lost instrument no witness mentioned a provision of that character. Young, it is true, replied affirmatively when he was asked if he was to develop a mine if he found one; and he said that if he found gold he was to dig it out. That may have been, and we are inclined to think it was, merely his interpretation of his duty under the contract. At any rate, the evidence would not authorize an appellate court to reverse the trial court, and hold that the agreement was one for the joint working of a mine, after its discovery and location. There was no evidence of an agreement other than the one reduced to writing. Both Keenan and Park testified that they had not authorized Young to borrow money or to contract debts in their name or for the company.

If any liability rests upon the defendants as mining partners to pay the claim of the plaintiff, it must arise in consequence of the agreement entered into between them and Young. In view of the evidence, we are of the opinion that the learned district court would have been justified in holding that the contract did not by its terms contemplate the [361] subsequent working of a mine by Young. The contract seems to have approached more nearly a prospecting or "grubstake" contract than a mining partnership. A prospecting contract is said to partake of the character of a qualified partnership, although Mr. Lindley in his valuable work regards the term "partnership" to be a misnomer as applied to the ordinary "grubstake" contract: 2 Lindley on Mines, sec. 858. That author describes such a contract in its usual scope to be simply a common venture, wherein one party called the outfitter, supplies the "grub," and the other, called the prospector, performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement: 2 Lindley on Mines, sec. 858. We entertain no doubt but that such a contract may go further and so provide relative to the duties and rights of the parties thereunder as to constitute a partnership. Or it may so provide as to render the outfitter liable for the personal expenses of the prospector after the exhaustion of the money furnished at the outset. The liability, it would seem, must depend upon the contract which the parties have made, the same as in any other case.

The agreement in this case definitely fixed the amount of money to be furnished to the prospector. The parties did not contract to supply him indefinitely with provisions and sup-

plies, nor, indeed, did they, in terms, agree to furnish those things. Doubtless, it was understood that the money supplied to Young would be employed by him in paying his necessary traveling expenses and in securing the supplies, such as provisions and tools, to enable a performance on his part of the agreement. But the agreement was not to provide him with necessaries while he furnished his services. The defendants paid him a certain sum of money and agreed, during his absence, whether for one year or longer is immaterial, to furnish his family with a monthly allowance for their maintenance; and, in addition thereto, he was to receive an interest in any property discovered by him. The prospector himself states that the seven hundred dollars [362] was all that he understood the other parties to the contract were to pay.

It is evident that, by virtue alone of the agreement, he could have had no legal recourse upon them for more money to pay his personal expenses. We are unable to see how the contract can be extended by judicial construction to cover additional liability on the part of those furnishing the money portion of the capital for the common enterprise. To do so would, in effect, be equivalent to holding that when one has merely agreed to provide and does provide a definite sum of money to another, to use in prospecting for mineral, by that act alone he becomes bound for all expenses incurred by that other for personal supplies after, or even before, the sum originally furnished has been exhausted. We do not think that is the law. We have not been cited to any case announcing such a doctrine, and we are aware of no principle in the law that would authorize it. This is not a case, at least as to Keenan and Park, of persons holding themselves out to the world as partners. Young told the plaintiff that the defendants had furnished him certain sums of money. He did not inform him that they had agreed to furnish more or to be responsible for more, except to show him the letter of Gosling, which will be noticed later on. And it would not have bound those not assenting to it, if he had so represented the agreement. Keenan testified that he did not expect Young to remain in Alaska after the money supplied him had been spent. Of course, the individual understanding of the witness could not have changed the provisions of the contract; but we think it did not have that effect. The contract was not shown to contain anything authorizing the prospector to continue at the further expense of the other parties, after exhausting the money received by him.

We think, therefore, that the character and provisions of the agreement were not such as to impose the alleged liability upon the defendants. There was no error in permitting the defendants Keenan and Park to state that they had not authorized Young to borrow money or contract debts [363] on their individual behalf or on behalf of the company or association. It was not permitting partners to testify as to agreements between themselves limiting their liability. Not being otherwise responsible, they were allowed to testify that they had not specially authorized the contracting of the debt. The cases cited to show that partners cannot evade liability for debt contracted by one member of the firm, by proof of an express agreement denying his power to incur debts without consent of the others, unless the creditor had notice of the agreement, are not applicable.

Finally, it is contended that the court erred in excluding the offer to prove by the witness Young that the letter he received from the defendant, Gosling, directed him to borrow money and supplies from the plaintiff, and that he and the company would be responsible for the amount. And, in view of the testimony of the plaintiff stating some of the contents of the letter, that the judgment should have gone against Gosling, if not all of the defendants.

The plaintiff stated that in the letter Young was directed to borrow money and stay another winter and prospect, and that the company would be responsible, and the plaintiff would get his money back. If admissible at all, it does not necessarily follow from the fact that the above was brought out in the testimony of Hartney, that the exclusion of the offered testimony was harmless, for the reason that the offer was not confined to proof of promised liability on the part of the company, but embraced a statement that the writer of the letter would be also "personally" responsible.

As the offer did not go to the extent of tendering proof that Keenan and Park knew of the letter, or that they had authorized it, or assented to it, it could not have affected them, and, strictly speaking, as against them the letter would not have been admissible, and as to them, therefore, no error was committed in rejecting the offer. Gosling possessed no more power than Young to bind the other parties.

But under our statute judgment may be given for or against one or more of several defendants: Rev. Stats., sec [364] 3752. Under such a statute it is well settled that where several per-

sons are sued as partners, and part only prove to be liable or to have authorized the contract, or are found to be partners, judgment may be rendered against them and for the others; and this is the rule in actions on contract as well as in tort. In actions on contract the statute changes the common-law rule: Bates on Partnership, sec. 1094; Roggenkamp v. Hargreaves, 39 Neb. 540, 58 N. W. 162; Lampkin v. Chisom, 10 Ohio St. 450; Morgan v. Righetti (Cal.), 45 Pac. 260; 11 Ency. of Pl. & Pr. 853; 1 Ency. of Pl. & Pr. 960. See, also, Rainsford v. Massengale, 5 Wyo. 1, 35 Pac. 774; Fisher v. Hopkins, 4 Wyo. 379, 62 Am. St. Rep. 38, 34 Pac. 899.

Hence, the question arises whether the evidence offered was admissible as against Gosling as tending to show his liability for the claim sued on, or any part of it. The loss of the letter was established, and if it would have been competent and relevant to the issue, evidence to prove its contents would have been equally proper.

It is clear that it would not have been material as to the one hundred and eighteen dollars advanced in February and March, 1898, for the reason that at that time the plaintiff had not seen the letter; and, therefore, did not part with his money in reliance upon it. But he testified that he bought the provisions for Young in the summer on the strength of the letter. As to the debt then incurred by Young, we are of the opinion that the evidence offered was competent and relevant as tending to show that Gosling had as to the plaintiff held himself out as a partner of Young, and authorized him to borrow money from the plaintiff. Indeed, the testimony of the plaintiff that went in without objection, purporting to give the contents of the letter, had the same tendency. But from the exclusion of the same character of testimony, when twice offered, it is evident that the trial court did not regard the matter as material, and it is evident also, we think, that counsel on both sides so understood the mind of the court and did not, therefore, further pursue the theory of individual responsibility on the part of [365] Gosling. We are not advised by the record whether Gosling was or was not present at the trial. But if he was, it may reasonably be assumed that if he could have given an explanation of the letter favorable to himself, it was not deemed necessary for him to do so, in view of the very plain indication that the court would entirely disregard the testimony of the plaintiff concerning the letter.

We do not conceive it incumbent on us to hold that the testimony as it stood was sufficient to charge Gosling before we should disturb the judgment as to him, because it is apparent to our mind that the case was decided without any reference to the letter as bearing upon the personal liability of the writer thereof, and that it was treated as though not in the case. For that reason also it seems to us that the exclusion of the offered testimony cannot be said to have been harmless as merely cumulative.

The testimony offered on the subject of the letter should have been admitted, and in view of the situation above stated, according to our understanding from the disclosures of the record, its exclusion amounted to prejudicial error. To show that the defendant Gosling had so acted as to entitle plaintiff to believe him to be a partner with Young, and as such to have authorized the latter to borrow money from the plaintiff would not be fatally variant from the allegation of partnership in the petition: Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744; Reber v. Columbus etc. Co., 12 Ohio St. 175; Hancock v. Hintrager, 60 Iowa, 374, 14 N. W. 725. In Cornhauser v. Roberts, 75 Wis. 554, 44 N. W. 744, it being contended by counsel that where one is sought to be charged as a partner on the ground that he has held himself out as such, and so induced credit to another as a copartner, the complaint must set out the facts essential to charge the one who is not in fact a partner, but has by his act misled the creditor, and that recovery cannot in such case be had upon a general allegation of partnership, it was said by the Wisconsin court: "We think this contention of the learned counsel for the defendants is not sustained by principle or authority. The complaint alleges [366] that the defendants are indebted to plaintiff as partners for goods sold and delivered to them as partners. The defendants, by their answer, deny the partnership. It becomes necessary, therefore, for the plaintiff to prove the partnership in order to maintain its action. This it may do by direct proof of the partnership, by the admissions of the several defendants that they were at the time partners, or by other acts which show that they were holding themselves out as partners." And, further, it is said that "the mere fact that the evidence is also evidence upon which an estoppel in pais might be based is no objection to the evidence as admissible to prove the alleged partnership": See, also, Rainsford v. Massengale, 5 Wyo. 1, 35 Pac. 774. In the case cited from Iowa it was said: "Appellant was sued as a partner, and

any evidence which tended to show that he was liable to the plaintiff as a partner was competent. It was neither proper nor permissible to plead evidence."

Should the effect of the evidence be to establish a guaranty for a debt to be incurred by Young, rather than a holding out as a partner, we incline to the opinion that it would constitute a total failure of proof: Packard v. Snell, 35 Iowa, 80. Upon that theory the letter would not be admissible or relevant. But, in connection with the previous agreement, we think, upon a careful scrutiny of the offer as made, its tendency was to show that the direction to borrow money was made to Young upon the theory of a partnership. What would be developed upon its admission and subsequent explanation by the defendant, we cannot know.

From objections made on the trial, it seems that counsel for defendants took the view that the transaction in the summer of 1898 did not amount to a loan of money; but that, as provisions were furnished to Young in the manner hereinbefore stated, there could be no recovery therefor under the petition alleging an indebtedness for money loaned. That might depend altogether upon the arrangement between plaintiff and Young. It may be that plaintiff agreed to provide Young's share of the money necessary to buy the required [367] supplies, the amount thereof to be subsequently determined upon between them; and that the matter was treated and considered strictly as a loan of money, although the money itself was handed over to the proprietor of the store where the goods were purchased instead of to Young. We are not prepared to say that the facts are not susceptible of that interpretation. The receipt given when the parties separated was for money. Plaintiff states that both of them bought the goods, although he furnished the money. Mr. Keenan testified that upon the plaintiff's return the latter said to the witness that he gave Young five hundred dollars "for you fellows up there."

As the case must be remanded as to Gosling for the manifest error in excluding the offered testimony, and there must be a new trial, we do not care to express a decided opinion as to his liability upon the testimony before us; and hence we do not wish to be understood as holding that the facts at the former trial established a case of a loan of money to Young. Upon the facts brought out at that trial, we think the question may be regarded perhaps as a close one. Neither have we considered whether, if the plaintiff's case is other than that for money

loaned, it is such a one as would authorize an amendment to the petition, nor have we gone into the question of the effect, if any, upon Gosling's liability of the arrangement between Hartney, Young and their two companions on the prospecting trip for a joint interest in their discoveries.

For the error in excluding the testimony concerning the letter of Gosling, the judgment as between him and the plaintiff must be reversed, and the case as between them remanded for a new trial. There is no error in the record as to the defendants Keenan and Park. The judgment in their favor will be affirmed.

Corn and Knight, JJ., concur.

Mining Partnerships are discussed in the monographic note to Skillman v. Lachman, 83 Am. Dec. 104-111; and the subsequent cases of Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Judge v. Braswell, 13 Bush, 69, 26 Am. Rep. 185; Slater v. Hass, 15 Colo. 574, 22 Am. St. Rep. 440, 25 Pac. 1089; Harris v. Lloyd, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736; Childers v. Neely, 47 W. Va. 70, 81 Am. St. Rep. 777, 34 S. E. 828.

Cotenancy in Mines is the subject of a monographic note to Cedar Canyon Con. Min. Co. v. Yarwood, 91 Am. St. Rep. 851-889.

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ANIMALS.

1. **TRESPASS by Livestock on Uninclosed Lands.**—Although a person is not liable for trespass if his livestock, running at large, stray upon uninclosed premises, yet if he drives or permits such stock to be driven, intentionally and persistently, upon the uninclosed lands of another, against his will, a trespass occurs for which he may recover. (Wyo.) Cosgriff Bros. v. Miller, 977.

2. **TRESPASS on Uninclosed Land by Livestock.**—If a person knowing that uninclosed land is the property of another, deliberately and intentionally drives his livestock thereon and depastures the land against the express will or consent of the land owner, the one so acting is guilty of an actionable trespass, and is liable in damages for the injury done. (Wyo.) Cosgriff Bros. v. Miller, 977.

3. **TRESPASS on Uninclosed Land—Absence of Marked Boundary.**—If a person knowing uninclosed land to belong to another, de-

liberately drives his livestock thereon and depastures the land against the expressed will and consent of the owner, he cannot escape liability for the trespass thus committed because of his inability to identify such land, caused by the failure of the owner to erect any artificial markings of the boundaries. (Wyo.) Cosgriff Bros. v. Miller, 977.

4. **TRESPASS—Damages—Evidence.**—If in trespass for grazing sheep upon and depasturing the land of plaintiff who is the owner of a large number of sheep ordinarily kept by grazing thereon, it is admitted that there are no other available sheep ranges in the vicinity, evidence is admissible under a general allegation of damage to show that during the winter following such trespass, plaintiff necessarily incurred expense in feeding hay to his sheep in consequence of the trespass, as tending to show the value of the range thus destroyed and the damage to his possessions. (Wyo.) Cosgriff Bros. v. Miller, 977.

APPEAL AND ERROR.

1. **APPEAL AND ERROR—Weight of Evidence.**—An appellate court cannot weigh the evidence, and where there is evidence in support of a general verdict, which sustains it and all the material issues, it will not be disturbed on appeal. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

2. **VERDICT—Conclusiveness of.**—If the evidence is conflicting the verdict is conclusive of the merits of the case. (Iowa) Lutz v. Anchor Fire Ins. Co., 349.

3. **PRACTICE—Harmless Error.**—The admission of evidence of credits appearing on the account, if erroneous, does not prejudice the defendant, and he cannot be harmed by the fact that they were before the jury. (Vt.) McDowell v. McDowell, 831.

4. **INTERVENTION, When the Code Provides** that it shall be made before the trial, cannot be allowed after final judgment has entered, and the parties are prosecuting an appeal therefrom. (Wash.) Hight v. Batley, 851.

5. **PRACTICE—Parties, Substitution of, Where the Action is One of Common or General Interest.**—Though a suit purports to be brought by the plaintiff in his own behalf, and in behalf of other taxpayers, and citizens of a city, other taxpayers are not entitled, pending an appeal, to be substituted as parties in place of the plaintiff and to have a time fixed within which they may file a bond on appeal. (Wash.) Hight v. Batley, 851.

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1. **ARREST—Killing Innocent Person in Attempting.**—The law which gives an officer the right to kill an escaping felon requires him to know that he is the felon, not an innocent person, whose life he is attempting to take. (Ky.) Johnson v. Williams, 416.

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ASSIGNMENT FOR CREDITORS.

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—Parties—Special Proceedings.**—If a grantor in an assignment for the benefit of creditors dies, his personal representative and the assignee may join in a special proceding to sell his land to pay debts. (N. C.) Robinson v. McDowell, 704.

2. **ASSIGNMENTS FOR BENEFIT OF CREDITORS.—Sale of Land—Title of Purchaser.**—If an assignee for the benefit of creditors and the administrator of the grantor in such assignment, join in a proceeding to sell his land, alleging that such grantor died seised of such land in fee, the title of the purchaser at the sale under such proceeding is not affected by such allegation. (N. C.) Robinson v. McDowell, 704.

3. **LIMITATION OF ACTIONS.—Part Payment by an Assignee for the Benefit of Creditors,** of a debt included in the assignment does not toll the running of the statute of limitations against such debt. (N. C.) Robinson v. McDowell, 704.

4. **LIMITATION OF ACTIONS—Assignment for Creditors.**—If it is discretionary with the assignee for the benefit of creditors, as to the time of the sale of the property assigned, the power of the assignee to sell and apply the proceeds of the sale to the debts is not destroyed simply because the debts secured may be barred by the statute of limitations. (N. C.) Robinson v. McDowell, 704.

5. **LIMITATION OF ACTIONS—Assignment for Creditors—Sale of Homestead.**—If the grantor in an assignment for the benefit of creditors retains his homestead, his assignee may, upon his death, sell the homestead to pay his debts, though such debts are barred by the statute of limitations. (N. C.) Robinson v. McDowell, 704.

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BANKRUPTCY.

BANKRUPTCY—Demands not Discharged by.—A Judgment for Criminal Conversation is for a willful and malicious injury to both the person and the property of a husband, and, by virtue of section 17 of the national bankruptcy act, is exempt from the effect of the discharge. (N. Y.) Colwell v. Tinker, 587.

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BANKS AND BANKING.

1. **BANKING—Money Collected, Right to on Insolvency.**—If a bank to which a note is sent for collection, instead of remitting the proceeds as instructed, uses them in its business, the assets of the

bank, in the hands of a receiver, upon its insolvency, are not impressed with a trust for the payment of the money so collected and used. (Ga.) Ober & Sons Co. v. Cochran, 118.

2. **BANKING—Collections—Negligence of Correspondent.**—A bank receiving notes for collection is not liable in respect thereto for the negligence of its correspondent, whom it exercises due care in selecting. (Ky.) Second Nat. Bank v. Merchants' Nat. Bank, 439.

3. **BANKING—Collections—Negligence Respecting Correspondent.**—If a bank, in a time of financial stress, forwards a note to another bank for collection, knowing that the cashier thereof is the secretary and treasurer of the corporation which executed the note, and the note is not paid nor heard from after maturity, it should make inquiry promptly, and notify the depositor without unreasonable delay; failing to do so, it is liable for its correspondent's negligence in not presenting the note for payment, or protesting it for nonpayment. (Ky.) Second Nat. Bank v. Merchants' Nat. Bank, 439.

4. **BANKING—Collections—Negligence Respecting Correspondent.**—If a bank receiving two notes for collection forwards one to its correspondent bank, but fails to hear from it after maturity, it is negligent in sending the other to the same bank. (Ky.) Second Nat. Bank v. Merchants' Nat. Bank, 439.

See Executors and Administrators; Guardian and Ward.

BASTARDS.

CONSTITUTIONAL LAW—Penal Codes may not Authorize Civil Proceedings.—A Bastardy Proceeding, being an action commenced and prosecuted in the ordinary manner of civil actions, and which may result in a judgment charging the defendant with the support of the child, to be enforced by execution, is not a criminal proceeding, and hence cannot be authorized in a penal code, if every statute must embrace but one object which must be expressed in its title. (Wash.) State v. Tieman, 854.

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BILLS AND NOTES.

1. **NEGOTIABLE INSTRUMENTS—Notice of Accommodation Paper.**—One who receives a note for the debt of another which bears the indorsement of a third person or corporation not in the chain of title is charged with the notice that the indorsement is an accommodation indorsement. (Wis.) Pelton v. Spider Lake Sawmill etc. Co., 946.

2. **NEGOTIABLE INSTRUMENTS—Accommodation Paper—Question for the Jury.**—Though a note indorsed by a corporation shows on its face that the indorsement is not in the chain of title and is presumptively an accommodation indorsement, if there is testimony tending to show a consideration for the indorsement, the question must be submitted to the jury, notwithstanding other evi-

dence to the effect that there was no consideration. (Wis.) Pelton v. Spider Lake Sawmill etc. Co., 946.

See Corporations, 1; Guardian and Ward.

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CARRIERS.

1. CARRIER, NEGLIGENCE OF.—A Passenger has Two Remedies between which to elect when injured by a carrier's negligence, one an action for breach of contract and the other an action on the case for the wrong. (Ga.) Aiken v. Southern Ry. Co., 107.

2. CARRIER.—An Ordinary Railway Ticket is not a Contract between the passenger and carrier, but is evidence of the right to transportation furnished in consequence of a contract to carry. (Ga.) Aiken v. Southern Ry. Co., 107.

3. CARRIER—Purchase of Ticket by Husband for His Wife.—The purchase of an ordinary railway ticket by a husband for his wife does not constitute a contract between him and the carrier for her safe transportation, but the contract for safe passage which the law implies is in her favor, and in her behalf alone can an action be maintained for its breach. (Ga.) Aiken v. Southern Ry. Co., 107.

4. CARRIER—Exemplary Damages for Assault by Conductor.—A street railway company is liable in exemplary damages for a malicious assault upon a passenger by a conductor in the course of his employment. (Ky.) Lexington Ry. Co. v. Cozine, 430.

5. CARRIER—Bill of Lading, When a Thorough Contract.—If the point of destination in a bill of lading is left blank, but an indorsement at the end thereof shows, in fact, that such point is beyond the carrier's own line, the contract is prima facie an agreement to carry to that place. (Mo.) Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 508.

6. CONNECTING CARRIER—Exempting from Negligence of.—Under the Missouri statutes, a carrier cannot contract for a through shipment to a point beyond its own line, and at the same time exempt itself from liability for the negligence of a connecting carrier. (Mo.) Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 508.

7. CONNECTING CARRIER, Negligence of—Interstate Commerce.—The Statute of Missouri extending the liability of a carrier for the negligence of connecting carriers when it receives goods for shipment to points without that state, beyond the terminus of its line, is not unconstitutional. (Mo.) Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 508.

8. CARRIER—Conversion by Delivery to the Wrong Person.—If a carrier disobeys the directions of a shipper as to whom delivery shall be made, he is liable for conversion, notwithstanding he offers, upon the goods being restored to him after their wrongful delivery, to return them to the shipper. (Mo.) Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 508.

9. RAILROAD—Injunction to Furnish Cars.—A shipper is entitled to a mandatory injunction against a railroad company to furnish him cars, when it refuses to fulfill its obligations in this re-

spect, notwithstanding his remedy at law for damages. (Ky.) Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 447.

10. **RAILROAD—Injunction to Furnish Cars—Obstructing Street.** A mandatory injunction against a railroad company to furnish a shipper cars should be refused when the cars will be stood in the center of a street for loading, and the city has not authorized such a use of the thoroughfare. (Ky.) Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 447.

CERTIORARI.

1. **THE WRIT of Certiorari Reaches Only Jurisdictional Errors** when sued out to test the validity of some judicial or quasi judical proceeding. It has no other use except to bring before the court a record material to be considered in exercising jurisdiction in deciding a matter presented by some other writ. (Wis.) State v. Whitcher, 968.

2. **CERTIORARI and Habeas Corpus, Differences Between.**—A writ of habeas corpus reaches the body, but not the record. It also reaches jurisdictional matters, but it does not reach the record. The writ of certiorari reaches the record, but not the body. (Wis.) State v. Whitcher, 968.

See Habeas Corpus.

CHASTITY.

See Homicide, 5.

CHRISTIAN SCIENCE.

See Criminal Law, 10.

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COMMERCE.

1. **CONSTITUTIONAL LAW—Interstate Commerce, What is not.** A Cab Service maintained in the city of New York by a foreign railway corporation to transport to and from various points within that city its passengers who are conveyed to and from the city by a ferry from the railway terminus of the corporation in another state, such cab service both beginning and ending within the city, is not incidental to, nor any part of, interstate commerce, and the capital employed in making such service is not exempt from taxation imposed by sections 182 and 184 of the laws of 1896, chapter 908, relating to franchise taxes upon corporations. (N. Y.) People v. Knight, 610.

2. **CONSTITUTIONAL LAW—Interstate Commerce—Adulterated Articles.**—Chapter 839 of the act of Congress of 1890, declaring it to be unlawful to import into the United States any adulterated or

unwholesome food or drug, or any vinous or malt liquors, adulterated or mixed with any poisonous or noxious chemical, conceding it to be intended to prohibit only adulterated articles which are injurious to the public health, does not contain any provision authorizing the importation of articles which are adulterated for the purpose of deceiving or defrauding purchasers or consumers, and therefore does not conflict with the statute of New York upon these subjects. (N. Y.) Crossman v. Lurman, 599.

3. **CONSTITUTIONAL LAW—Interstate Commerce, Right of the State to Prohibit the Sale of Articles Adulterated by Coloring.**—The statute of New York prohibiting any person from having, or offering for sale, any adulterated drug or food, and declaring that an article must be deemed adulterated if it is colored, coated, polished or powdered, whereby a defect is concealed, or it is made to appear better than it really is, or of greater value, is constitutional, though applied to articles imported from a foreign country. (N. Y.) Crossman v. Lurman, 599.

See Carriers, 5-7; Corporations, 13-15.

COMPROMISE OF TAXES.

See Municipal Corporations, 5, 6.

CONFESSIONS.

See Evidence, 27.

CONFLICT OF LAWS.

See Death; Descent and Distribution; Executors and Administrators 3-4.

CONSOLIDATION OF CORPORATIONS.

See Constitutional Law, 5; Corporations, 3.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—Statute Void in Part, When may Stand as to the Residue.**—A statute purporting to impose a tax on insurance corporations based on the excess of premiums received over losses and expenses incurred and exempting the corporation from all other taxation, though void as to the exemption, is valid and enforceable in other respects. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

2. **CONSTITUTIONAL LAW.—Reasonable Doubts of the Constitutionality of a Statute are Resolved** in favor of its validity. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

3. **CONSTITUTIONAL LAW—Statutes, When must not be Declared Unconstitutional.**—An act of the legislature should not be declared unconstitutional unless it is clearly apparent that the act is in violation of some constitutional provision. (Cal.) Deyoe v. Superior Court, 73.

4. **CONSTITUTIONAL LAW.—Every Presumption** must be indulged in favor of the validity of a statute, and it can be held un-

constitutional only after resolving and rejecting every reasonable doubt in favor of the validity. (Ill.) People v. People's Gaslight etc. Co., 244.

5. **CONSTITUTIONAL LAW—Special Legislation.**—A statute authorizing the merger or consolidation of all gas companies doing business in the same city, is not unconstitutional as being special or local legislation. (Ill.) People v. People's Gaslight etc. Co., 244.

6. **CONSTITUTIONAL LAW.—Articles 4 and 5 of the Amendments to the Constitution of the United States** do not apply to actions in the state courts. (N. Y.) People v. Adams, 675.

7. **CONSTITUTIONAL LAW.—Laws in the Supposed Exercise of the Police Power Interfering with a Citizen's Right of Property** can be justified and sustained only upon the ground that they in some manner secure the comfort, safety or welfare of society. (Wis.) Huber v. Merkel, 933.

8. **CONSTITUTIONAL LAW—Police Power.**—To sustain a statute as referable to the police power, it must appear that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. (Ill.) Horwich v. Walker-Gordon etc. Co., 254.

9. **CONSTITUTIONAL LAW—Statute Making Innocent Act Criminal.**—The legislature cannot, under cover of the police power, make the purchase unlawful of a receptacle, bearing a registered trademark, without the written consent of the owner. The legislature cannot pronounce the performance of an innocent act criminal, when the exercise of the police power is not involved. (Ill.) Horwich v. Walker-Gordon etc. Co., 254.

10. **CONSTITUTIONAL LAW—Trademark Act.**—A statute making the purchase of a certain receptacle bearing a registered trademark, without the consent of the owner, unlawful, is unconstitutional and void as granting to the owner of a specific class of personal property, rights and privileges not possessed by owners of other personalty. (Ill.) Horwich v. Walker-Gordon etc. Co., 254.

11. **CONSTITUTIONAL LAW — Discrimination — Evidence.**—A statute making the possession of a certain class of dealers of receptacles having registered trademarks prima facie evidence that such possession is unlawful, is unconstitutional and void as making an unwarranted distinction between such dealers and other dealers or persons, and as rendering it possible to convict them upon evidence, upon which others could not be lawfully convicted. (Ill.) Horwich v. Walker-Gordon etc. Co., 254.

12. **CONSTITUTIONAL LAW.—Class Legislation** is not unconstitutional, provided the class is composed of individuals possessing in common some disability, attribute, or qualification, or in some condition marking them as proper objects for legislation. (Ill.) Horwich v. Walker-Gordon etc. Co., 254.

13. **CONSTITUTIONAL LAW—Special or Class Legislation, When Valid.**—The legislature has the right to enact laws applicable to one class of citizens only, where the classification is authorized by the constitution and is based upon extrinsic differences requiring different legislation. (Cal.) Deyoe v. Superior Court, 73.

14. **CONSTITUTIONAL LAW—Differences in Rules of Procedure.** A proceeding to dissolve the marriage relation is, by reason of the interest of the state, intrinsically different from an ordinary action, and that difference justifies, and in many cases necessitates, different rules of procedure. (Cal.) Deyoe v. Superior Court, 73.

15. **CONSTITUTIONAL LAW—Municipal Corporations.**—An act fixing the price of unskilled labor on all public works at not less than a sum specified is a legislative interference with the liberty to contract by counties, cities and towns, which finds no sanction or authority in the doctrine that counties, cities and towns and municipal and political subdivisions of the state. (Ind.) Street v. Varney etc. Supply Co., 325.

16. **CONSTITUTIONAL LAW.—The Minimum Wage Law** purporting to fix a minimum rate to be paid unskilled labor employed upon any public work of the state or of any county or city therein is unconstitutional. It violates the fourteenth amendment to the constitution of the United States and sections 1 and 23 of article 1 of the constitution of Indiana, securing to every citizen the inalienable right of liberty and the pursuit of happiness, and prohibiting the granting by the legislature to any citizens or class of citizens of privileges and immunities which, upon the same terms, shall not equally belong to all citizens. (Ind.) Street v. Varney etc. Supply Co., 325.

17. **CONSTITUTIONAL LAW.—Liberty to Contract,** subject only to limitations imposed in the legitimate exercise of the police power for the public welfare, is secured by the constitution of this state and by the fourteenth amendment to the constitution of the United States. (Ind.) Street v. Varney etc, Supply Co., 325.

18. **CONSTITUTIONAL LAW.—A Statute Prohibiting the Assignment of Future Wages** to become due employés is constitutional. It does not violate the fourteenth amendment to the constitution of the United States nor section 1 of article 1 of the constitution of Indiana, declaring all men endowed with certain inalienable rights, among which are life, liberty, and the pursuit of happiness. (Ind.) International Text-Book Co. v. Weissinger, 334.

19. **CONSTITUTIONAL LAW—Due Process of Law.**—The object and meaning of the phrase, "due process of law," is to secure to everyone the right to have notice of any proceeding by which his rights of life, liberty or property may be affected, and to have an opportunity to defend, protect, and enforce such rights in an orderly proceeding adapted to the nature of the case. The essential elements of due process of law are notice and an opportunity to defend. (N. C.) Parish v. East Coast Cedar Co., 718.

20. **CONSTITUTIONAL LAW—Right of the State to Provide for the Ascertainment of the Title to Property.**—A state is not bound to have the regular and lawful use of property left subject to restrictions and uncertainty where the owner so absents himself from the state that he is presumed to be dead. If a fair and reasonable provision is made for the protection of his rights in case of his reappearance, the state has not exceeded its constitutional powers. (Pa. St.) Cunnius v. Reading School District, 790.

21. **CONSTITUTIONAL LAW—Statutes, Vested Rights in.**—A citizen can have no vested right in any general law which can prevent its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. (Mont.) Stanford v. Coram, 566.

22. **CONSTITUTIONAL LAW—Common-law Rights, When may not be Taken Away.**—Where private property rights were founded upon and preserved by any part of the common law in force at the time of the adoption of the constitution of Wisconsin, they cannot be taken away or impaired by mere legislative enactment, but only for

public purposes by the exercise of eminent domain or by the exercise of the police power for the protection of the public. (Wis.) Huber v. Merkel, 933.

See Bastards; Commerce; Corporations, 6-16; Criminal Law, 9-20; Divorce; Executors and Administrators, 1, 2; Licenses; Physicians and Surgeons; Statutes; Taxation, 6; Waters and Watercourses, 6, 7; Witnesses, 4, 5.

Note.

Constitutional Law, medical attendance, statutes requiring to be furnished to minors, 753.
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CONTRACTS.

1. CONTRACTS—Waiver of Compensation.—A person may waive compensation for labor performed, both before and after its completion, and cannot afterward change his mind and charge for that which he undertook to do as a gratuity. (Ind.) Polk v. Johnson, 274.

2. A CONTRACT FOR GRATUITOUS SERVICE is not Invalid for Want of Consideration, if the person promising to render such service receives all the material benefits which were anticipated when the promise was made, as where his property or business is incidentally benefited, or the performance of the act affords him pleasure, gratifies his ambition, pleases his fancy, or is an expression of his appreciation of the service another has done him. (Ind.) Polk v. Johnson, 274.

3. FRAUD—Negligence as a Bar to Relief from.—The Negligence of a Party in Failing to Read a Paper which he has signed does not preclude him from attacking its validity. (N. Y.) Wilcox v. American Telephone etc. Co., 650.

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CONVERSION.

1. **REAL ESTATE, Conversion of Into Personalty by Will, Time of.**—Conversion takes place from the death of the testator only when there is a positive direction to sell. (Pa. St.) In re Cooper's Estate, 799.

2. **REAL ESTATE, Conversion of Into Personalty by Will, What Necessary to.**—To work a conversion of the testator's land into money from the time of his death, there must be a positive direction to sell, or an absolute necessity to sell to execute the will, or such a blending of real and personal estate by the will as to clearly show that he intended to create a fund out of both real and personal estate and to bequeath such fund as money. (Pa. St.) In re Cooper's Estate, 799.

3. **REAL ESTATE, Conversion of Into Personalty, When does not Take Place.**—A direction in a will to lease the testator's farm, if it can be done to advantage, otherwise to sell it at public or private sale at such time as the executor shall deem expedient, does not operate to convert the farm into personalty until the executor exercises his power of sale. (Pa. St.) In re Cooper's Estate, 799.

CORPORATIONS.

1. **CORPORATIONS.—An Officer of a Corporation has no Power to Execute Accommodation Paper in the Corporate Name** in the absence of special authority, and a person receiving such paper, know-

ing or being charged with knowledge that it is accommodation paper, cannot hold the property. (Wis.) Pelton v. Spider Lake Sawmill etc. Co., 946.

2. **CORPORATIONS—Stockholder's Liability—When Enforceable Against a Pledgee.**—One who, upon the books of a corporation, appears as a stockholder cannot escape liability by showing that he holds the stock as collateral security for the payment of a debt, if the statutes of the state provide for the keeping of a book by the corporation containing a list of stockholders, and that the entries on such book shall be conclusive evidence against directors and stockholders of the number of shares held by each. (Cal.) Hurlburt v. Arthur, 17.

3. **CORPORATIONS—Merger of by Legislative Authority.**—In the absence of constitutional limitation the legislature has full power to authorize the consolidation of private corporations organized under the law of the state. (Ill.) People v. People's Gaslight etc. Co., 244.

4. **FOREIGN CORPORATION—Right to Enforce Demands.**—Sections 1024-1026 of the Revised Statutes of 1899, of Missouri, do not prohibit a foreign corporation which, in the course of business in its home state, becomes the assignee or holder in trust of a claim against a citizen of Missouri, from coming into the state and pursuing every remedy and resorting to every means that a citizen might to collect or secure the benefit of that claim, including the right to purchase at an executor's sale. (Mo.) Meddis v. Kenney, 496.

5. **CORPORATIONS, FOREIGN.—The State may Deny** foreign corporations the right to transact business, hold property or exercise any corporate function within its liimts. (La.) State v. Hammond Packing Co., 459.

6. **CONSTITUTIONAL LAW—Right to Classify and Tax Foreign Corporations.**—The state has a right to classify foreign corporations doing business within it in a separate class and to tax them more and on a different basis from domestic corporations, and in so doing the former are not denied the equal protection of the law. (La.) State v. Hammond Packing Co., 459.

7. **CONSTITUTIONAL LAW—License Taxes.**—Constitutional provisions relating to equality of taxation are not generally applicable to license taxes. (La.) State v. Hammond Packing Co., 459.

8. **CONSTITUTIONAL LAW.—Corporations, Both Public and Private, are Entitled to the Benefit of the Provisions of the Fourteenth Amendment** for the preservation and protection of their right to make contracts affecting their local affairs. (Ind.) Street v. Varney etc. Supply Co., 325.

9. **CONSTITUTIONAL LAW.—Corporations**, either foreign or domestic, are not entitled to the privileges of citizens in a constitutional sense, save in the matter of jurisdiction to enable them to appear in the courts. (La.) State v. Hammond Packing Co., 459.

10. **CORPORATIONS, FOREIGN—When Subject to State Taxation.**—A statute declaring that every insurance corporation transacting business within the state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred applies to foreign life insurance corporations. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

11. **TAXATION—When Uniform on the Same Class of Subjects.**—A statute which applies to each and every insurance corporation or

company transacting business within the state, and provides the manner in which such corporations shall be taxed upon the excess of their premiums received over losses and expenses incurred, is uniform on the same class of subjects, within the meaning of the constitution. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

12. **CORPORATIONS, FOREIGN.—The Legislature has the Right to Prescribe Reasonable Terms** upon which foreign corporations may do business within the state. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

13. **TAXATION OF FRANCHISES—Right of Foreign Corporations to do Business Within the State.**—When a foreign corporation has, by complying with the terms of a statute, acquired the right to do business within the state, it obtains a privilege or right not possessed by citizens generally and not conferred upon it by its original franchise, and which may be subjected to taxation by the state. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. Co., 572.

14. **CORPORATIONS, FOREIGN—Interstate Commerce—Taxation, When Does not Interfere with.**—A statute applicable to foreign insurance corporations and authorizing taxation upon the excess of premiums received over losses and ordinary expenses incurred within the year in a county in which an agent transacts the business, does not interfere with interstate commerce. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

15. **INTERSTATE COMMERCE—License Tax on Foreign Corporations.**—The state has the right to regulate its interstate commerce, and a license imposed on a foreign corporation for the privilege of doing business within its limits is not a regulation of commerce, especially as to a business exclusively local in character. (La.) State v. Hammond Packing Co., 459.

16. **CONSTITUTIONAL LAW—Taxation, Want of Uniformity in.**—Under a constitution providing that the power to tax corporations or corporate property shall never be relinquished, a statute imposing a tax on insurance corporations based on the excess of their premiums received over losses and ordinary expenses incurred within the state and exempting them from all other taxes, is unconstitutional so far as the exemption is involved. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. Co., 572.

See Constitutional Law, 5.

Note.

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COURTS.

JURISDICTION.—A court which has jurisdiction of a cause of action of the character and amount sued upon cannot be held to be without jurisdiction to proceed, on the ground that a previous action on the same cause in a court of competent jurisdiction had resulted in a judgment against the plaintiff. (Vt.) Wilkins v. Stiles, 804.

CRIMINAL LAW.

1. **CRIMINAL LAW—Presence at Commission of Felony, What is.**—One who causes a crime to be committed through an innocent

agent is deemed constructively present at such commission, and the test is not whether the agent is morally innocent, but whether he is criminally responsible for the particular crime. (Ind.) Seifert v. State, 340.

2. **CRIMINAL LAW.—Where One Might not Otherwise be Deemed an Accessory, He may be Held as a Principal,** if there is no other person who may be treated as the principal. Otherwise we should have the solecism of a felony without a principal. (Ind.) Seifert v. State, 340.

3. **CRIMINAL LAW—Act of Principal when Act of Accessory.**—The act of the principal when done pursuant to the will and direction of the accessory, is the act of the latter, and he is liable as a principal. (Ill.) Burnett v. People, 206.

4. **AN ACCESSORY may be Tried Before the Principal,** if the law makes the offense of each a separate and distinct crime. (Ga.) Stone v. State, 145.

5. **ACCESSORY.—Perjury and Subornation** of perjury are independent crimes in Georgia; the suborner is not the accessory of the perjurer, and may be tried before the latter's conviction. (Ga.) Stone v. State, 145.

6. **ACCOMPLICE.—A Witness is an Accomplice Only When he** could have been tried as principal or accessory in the offense under consideration. (Ga.) Stone v. State, 145.

7. **ACCOMPLICE, Corroboration of.—At the Common Law a con**viction could be had on the uncorroborated testimony of an accomplice. (Ga.) Stone v. State, 145.

8. **ACCOMPLICE, Corroboration of.—The Practice of the Eng**lish judges in advising the jury to acquit where there is accomplice testimony only, was not within the terms of the Georgia adopting statute; and it has not been incorporated in the code of that state as to misdemeanors, nor as to felonies, except when the only witness to a fact is an accomplice. (Ga.) Stone v. State, 145.

9. **CONSTITUTIONAL LAW—Indeterminate Sentence.**—A statute fixing a maximum and minimum sentence under which the board of commissioners of paroled prisoners may release a prisoner on parol after the service of the minimum sentence, leaving him liable to rearrest if he violates his parol before the expiration of the maximum term, is constitutional. (N. Y.) People v. Adams, 675.

10. **CONSTITUTIONAL LAW—Christian Science or Divine Heal**ing.—The statute making it criminal for parents and others to omit to furnish medical attendance to a minor does not violate the provisions of the constitution gauranteeing to all persons the free exercise and enjoyment of religious profession and worship. The religious belief of the accused does not constitute any defense to a prosecution under the statute, as where he omitted to call a physician because of his belief in divine healing which could be accomplished by prayer, and because he did not believe in physicians. (N. Y.) People v. Pierson, 666.

11. **CRIMINAL LAW, Construction of—Who Bound to Furnish Medical Attendance to a Minor.**—Under a statute making it criminal for a person to omit to perform a duty imposed on him by law, to furnish food, clothing, shelter or medical attendance to a minor, the persons subject to conviction are parents, guardians and those who, by adoption or otherwise, have assumed the relation in loco parentis. (N. Y.) People v. Pierson, 666.

12. **CRIMINAL LAW, Construction of.**—The code provision making it criminal to omit, without lawful excuse, to perform a duty imposed by law to furnish food, clothing, shelter or medical attendance to a minor, means the necessary food, clothing, shelter or medical attendance required for the preservation of the health and life of the child. (N. Y.) People v. Pierson, 666.

13. **CRIMINAL LAW, Construction of—Medical Attendance for a Child, When must be Called.**—Under a statute making it criminal to omit to furnish medical attendance to a minor, it is not necessary to call a physician for every trifling complaint with which a child may be afflicted. A reasonable amount of discretion is vested in parents. The standard is at what time would an ordinarily prudent parent, solicitious for the welfare of his child and anxious to promote its recovery, deem it necessary to call a physician. (N. Y.) People v. Pierson, 666.

14. **CRIMINAL LAW—Indictment for Failing to Furnish Medical Attendance to a Minor.**—It is not necessarv to allege that the case was one in which a regularly licensed and practicing physician ought to have been called, in an indictment under the Penal Code of New York for failing to furnish medical attendance to a minor. It is sufficient that the indictment stated that the accused "did willfully, maliciously and unlawfully omit, without lawful excuse, to perform a duty imposed upon him by law, to furnish medical attendance for his said female child, under the age of two years, the said minor being then and there ill and suffering from catarrhal pneumonia," etc. (N. Y.) People v. Pierson, 666.

15. **CRIMINAL LAW—Medical Attendance on a Minor, Definition of.**—The medical attendance to a minor, the omission of which is made criminal by the Penal Code of New York, is the attendance of a regularly licensed physician, or in other words, the attendance of one who, by the laws of the state, is authorized to practice medicine. (N. Y.) People v. Pierson, 666.

16. **CONSTITUTIONAL LAW—Compelling a Person to be a Witness Against Himself, What is not.**—Receiving in evidence the private papers of an accused, unlawfully seized by officers of the law, is not the compelling of him to bear witness against himself, and the admission of such evidence is not a violation of the provision of the constitution against compelling any person in a criminal case to be a witness against himself. (N. Y.) People v. Adams, 675.

17. **CONSTITUTIONAL LAW—Compelling Person to be a Witness Against Himself—Unreasonable Search and Seizure.**—One accused of crime may be compelled to surrender his shoe for the purpose of permitting it to be compared with tracks found in the snow near the place where the crime was committed, and witnesses may be allowed to testify as to the result of such comparison. (Wis.) Thornton v. State, 924.

18. **CONSTITUTIONAL LAW—Unreasonable Search and Seizure. A Search of a Prisoner upon His Arrest** is not within the unreasonable searches and seizures prohibited by the constitution of the United States and of Wisconsin, and the fruits of such search are admissible in evidence against him. (Wis.) Thornton v. State, 924.

19. **CONSTITUTIONAL LAW.—Section 344a of the Penal Code of New York Making It Criminal for Anyone to Have in His Possession Certain Papers** commonly used in connection with a game or transaction known as "policy" is not unconstitutional. The papers to which the section refers are to be regarded the same as the tools

of a burglar or the gambling apparatus which are dealt with in the code, (N. Y.) People v. Adams, 675.

20. **CONSTITUTIONAL LAW—Statutes Making Certain Facts Presumptive Evidence of a Crime.**—Section 344b of the Penal Code of New York providing that the possession by any person, other than a public officer, of certain papers used in carrying on, promoting or playing the game commonly called "policy" is presumptive evidence of the possession thereof knowingly and in violation of the provisions of section 344a of the same code, is constitutional. (N. Y.) People v. Adams, 675.

21. **EVIDENCE—Papers Illegally Taken from the Accused.**—Private papers of an accused, unlawfully seized, are nevertheless admissible in evidence against him. (N. Y.) People v. Adams, 675.

22. **CRIMINAL LAW—Previous Conviction of the Accused, Admissibility of.**—The previous conviction of the accused of an offense may be shown and considered as affecting his credibility as a witness in his own behalf. (Wis.) Thornton v. State, 924.

23. **EVIDENCE—Prior Arrest.**—The reception in evidence of the fact that the accused had been arrested before is not prejudicial error when it is at once followed by other evidence showing for what the arrest was and that he was convicted. (Wis.) Thornton v. State, 924.

24. **EVIDENCE—Hearsay.**—A statement of an accused when he came home, in response to a question what time it was, is not admissible in evidence in his favor. (Wis.) Thornton v. State, 924.

25. **CRIMINAL PROSECUTION—Rejecting Evidence as to the Nonexistence of a Search-warrant.**—The rejection of evidence offered by an accused to show that certain papers received in evidence against him were procured by officers falsely claiming to be acting under a search-warrant is not error. The mode in which the evidence was procured is immaterial. (N. Y.) People v. Adams, 675.

26. **CRIMINAL LAW—Evidence.**—The jury must be instructed to receive with caution, verbal admissions of the accused made in response to questions at a time when his mental and physical condition is doubtful as a result of the use of drugs. (Ill.) Burnett v. People, 206.

27. **CONFESSIONS AS EVIDENCE.**—If the confession of an accused is introduced in evidence, those parts thereof which are in his favor are entitled to as much consideration as those which are against him, if they are not disproved, and are not improbable or untrue, when considered in connection with all of the other testimony in the case. (Ill.) Burnett v. People, 206.

28. **CRIMINAL LAW—Instructions as to Included Offenses.**—If it is clear that the accused is either guilty of the specific crime charged or not guilty of any, failure to instruct as to any crime which may be included in the one charged is not error. (Iowa) State v. Hoot, 352.

See Witnesses, 4, 5.

Note.

Criminal Proceedings, mandamus to compel the performance of official duties in, 905, 906.

CROPPERS.

1. **LANDLORD AND TENANT.**—A Cropper is One hired by the landlord to cultivate land, receiving for his compensation a portion

of the crops raised. An agreement to farm lands on the shares is a contract of service and not a lease, and the person doing the work is a mere cropper and not a tenant, and has no interest in the land. (Wis.) Kelly v. Rummerfield, 951.

2. **LANDLORD AND TENANT.—A Cropper cannot Convey the Legal Title** to his share of the crop to a third person before actual division and appropriation. (Wis.) Kelly v. Rummerfield, 951.

3. **REPLEVIN by a Landlord Against a Cropper.**—If a cropper, before any division of the crop, takes away what he claims is his share, the landlord may maintain replevin therefor. (Wis.) Kelly v. Rummerfield, 951.

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See Infants.

DAMAGES.

1. **DAMAGES—Exemplary.—Evidence of Financial Condition of Defendant** is admissible in cases founded in tort, where exemplary damages are claimed. (Wyo.) Cosgriff Bros. v. Miller, 977.

2. **EXEMPLARY DAMAGES.—If Malice, Fraud, Gross Negligence or Recklessness** enters into the commission of a tort, or if the act is done wantonly, exemplary damages are recoverable irrespective of criminal liability. (Wyo.) Cosgriff Bros. v. Miller, 977.

3. **DAMAGES—Special.—If Evidence** showing special damage has been admitted without objection, a complaint that the allegations of the petition are insufficient to cover special damage comes too late after verdict. (Wyo.) Cosgriff Bros. v. Miller, 977.

See Carriers; Death; Officers, 3; Partnership, 6; Trespass.

DEATH.

CONFLICT OF LAWS—Recovery for Death by Wrongful Act—Method of Distribution.—If a resident of one state is killed in an-

other state by wrongful act and his administrator appointed therein, sues and recovers there for such death, the fund thus recovered must be distributed according to the law of that state, although a prior administration on the estate of the deceased has been taken out in the state of his residence or domicile. (N. C.) Hartness v. Pharr, 725.

See Arrest.

DEEDS.

DEEDS—Return of Consideration, When not Necessary Before Attacking for Fraud.—Where a party is procured to sign a conveyance on the representation that it is a receipt for the sum of one dollar for money due him, it is not necessary for him, before attacking it, to offer to return the dollar. (N. Y.) Wilcox v. American Telephone etc. Co., 650.

Note.
Definition of Christian Science, 752.
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of due process of law, 724.
of executor de son tort, 193.
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of martial law, 772.
of osteopathy, 742.

DESCENT AND DISTRIBUTION.

1. **CONFLICT OF LAWS.—The Succession to, and the Distribution of, the Estate of an Intestate** are governed by the law of the domicile. (N. Y.) Maas v. German Savings Bank, 689.

2. **CONFLICT OF LAWS.—The Regulation of the Title and Devolution of Property** within its limits is within the control and jurisdiction of the state. (Pa. St.) Cunnius v. Reading School District, 790.

DIVORCE.

CONSTITUTIONAL LAW—Divorce Statute Prohibiting Entry of Final Decrees of Until After One Year from the Decision of the Court.—A statute providing that in suits for divorce, if the court finds a party entitled to a divorce. it shall enter an interlocutory judgment so declaring, but that final judgment shall not be entered until one year afterward, is constitutional, though the right to final judgment is not thus suspended in any other class of cases, and the constitution provides that the legislature shall not pass any local or special law regulating the practice in courts of justice. The intrinsic difference between suits for divorce and other cases justifies the enactment of special rules applicable to divorce suits only, and rules so enacted are not special legislation. (Cal.) Deyoe v. Superior Court, 73.

DOWER.

DOWER.—Statute of Limitations does not begin to run against the wife's right of dower until the death of her husband, even though a title by adverse possession has fully ripened as against him before his death. (Iowa) Lucas v. White, 880.

DYING DECLARATIONS.

See Abortion, 3-5; Homicide, 6.

EJECTMENT.

EJECTMENT—Avoiding Deed for Fraud in Actions of.—In an action of ejectment in which a deed executed by the plaintiff is received in evidence against him, he may avoid its effect by showing that it was procured by fraud, as by representing to him that it was a receipt, and thus obtaining his signature to it. (N. Y.) Wilcox v. American Telephone etc. Co., 650.

See Mortgages, 4.

Note.

Elections, mandamus to compel performance of official duties concerning, 888, 889.

ELECTRICITY.

1. **ELECTRIC CORPORATIONS—Duty to Insulate Wires.**—A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work or pleasure, to prevent injury. Such company must keep its wires perfectly insulated or provide sufficient safety appliances to protect against danger from them. (La.) Potts v. Shreveport Belt Ry. Co., 452.

2. **ELECTRIC CORPORATIONS—Duty as to Insulation of Wires.** It is the duty of an electric railroad company to use the utmost care and vigilance to keep all wires connected with its trolley perfectly insulated. It is its duty to know of any dangerous defect in or along its line arising from imperfect insulation and to immediately remedy such defect, and the fact that frequent inspections of the line were made to ascertain the conditions of the wires and to remedy defective insulation, does not relieve the company from liability. (La.) Potts v. Shreveport Belt Ry. Co., 452.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Public Use.**—To constitute a public use such as will justify the taking of private property under the right of eminent domain, something more than a mere benefit to the public must flow from the contemplated improvement, and the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. (Ill.) Gaylord v. Sanitary District, 235.

2. **CONSTITUTIONAL LAW—Eminent Domain.**—A statute which authorizes the condemnation of private property for the purpose of public mills, and machinery other than public grist-mills is unconstitutional and void, as permitting the taking of private property for a private use. (Ill.) Gaylord v. Sanitary District, 235.

3. **EMINENT DOMAIN—Public and Private Use.**—Authority to take private property under the exercise of the right of eminent domain for a public use does not confer the right to condemn private property for a public and also a private use. (Ill.) Gaylord v. Sanitary District, 235.

4. **EMINENT DOMAIN—Public Use, What is not.**—The application of water-power to the generation of electricity for use as the motive power of a railway is not a public use for which the legislature may authorize the exercise of the power of eminent domain. (Vt.) Avery v. Vermont Electric Co., 818.

5. **WATERCOURSE—Right to Compel Land Owner to Submit to Flowage.**—One riparian owner has no right to compel another to submit to the flooding of his land by the raising of dams on the lands of the former. A statute purporting to create or to give such a right cannot be supported on the ground that it is not the exercise of the right of eminent domain, but a statutory regulation of rights common to riparian owners. (Vt.) Avery v. Vermont Electric Co., 818.

6. **EMINENT DOMAIN—Taking or Damaging Property for a Public Use, What is.**—Under a constitution providing that property shall not be taken or damaged for a public use without just compensation, it is not necessary that there be any physical invasion of the individual's property to entitle him to compensation. (Mont.) Less v. Butte, 545.

7. **CONSTITUTIONAL LAW—Provisions, When Self-executing.** A provision in a state constitution declaring that private property shall not be taken or damaged for a public use without just compensation is self-executing, and requires no legislation for its aid. (Mont.) Less v. Butte, 545.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

1. **EQUITY—Adequate Remedy at Law, When Exists.**—If a party having a right to ground rents of a definite, specified amount enters into an agreement through a mistake of law, whereby he consents to the reduction of that amount, he has, if the agreement is conceded to be affected by such mistake, an adequate remedy at law against such agreement by bringing an action for such rents, and when the agreement is produced against him, proving the mutual mistake of law by the parties. (Pa. St.) Norris v. Crowe, 783.

2. **EQUITY—Mistake of Law, Relief from.**—Ignorance or mistake of the law, with a full knowledge of the facts, is not per se a ground for equitable relief. Hence, if a person entitled to a ground rent of six per cent, believing, through his ignorance of the law, that it is redeemable, enters into an agreement to accept five per cent, equity will not relieve him from the agreement. (Pa. St.) Norris v. Crowe, 783.

3. **EQUITY—Parties, General Rule Concerning.**—All persons who are interested directly or indirectly in the subject matter and in the relief granted by the decree should be brought into the suit. (N. Y.) Holly v. Gibbons, 694.

See Executors and Administrators, 20.

ESTATE OF DECEDENT.

See Descent and Distribution; Executors and Administrators.

EVIDENCE.

1. **EVIDENCE—Law of Other States—Presumption Respecting.**—Where the law of another state is not proved, it will be presumed to be the same as the law of the forum. (Cal.) Estate of Harrington, 51.

2. **CONFLICT OF LAWS.—The Rules of Evidence for the Ascertainment of Facts in Its Courts** are within the control and jurisdiction of the state. (Pa. St.) Cunnius v. Reading School District, 790.

3. **EVIDENCE—Judicial Notice—Subterranean Waters.**—The courts of Wisconsin take judicial notice that in that state there are now vast subterranean channels or caverns in which subterranean waters flow like a river. (Wis.) Huber v. Merkel, 933.

4. **EVIDENCE, RELEVANCY OF.—The Laws of Evidence are Adjusted to the Laws of Mind,** as well as to laws of the land; and any fact is relevant which, when taken alone or in connection with another, would warrant the jury in drawing a logical inference with reference to the issue on trial. (Ga.) Stone v. State, 145.

5. **EVIDENCE.—When Evidence is Provisionally Admitted** on the statement that it will subsequently be connected and made admissible, it is not for the court, of its own motion and without a request from opposing counsel, to exclude the evidence if the connection is not made. (Ga.) Stone v. State, 145.

6. **EVIDENCE—Statement, When not of an Opinion but of a Fact.**—The statement of a witness who worked in a mine in which the plaintiff was injured that he was unable, while at work in the bottom of the shaft, to determine in the darkness whether a ring used was a welded or a lap ring without making an examination of it, is a statement of fact and not of opinion, and is admissible in evidence, to be considered in determining whether the defect in the ring was known to the plaintiff or could have been known by the exercise of ordinary care under the conditions in the mine while he performed his duties in the shaft. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

7. **EVIDENCE, Materiality of, Waiver of Right to Question.**—One who, on the cross-examination of a witness, inquired of the size, shape and capacity of a bucket and the material of which it was made, cannot complain because his adversary, on re-examination, inquired into like matters, including the character of the ring used on the bucket, though such ring is admitted to be different from that on another bucket, from a defect in which the injury resulted for which the plaintiff seeks to recover. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

8. **EVIDENCE.**—Testimony that buckets in being hoisted out of a mining shaft would strike its sides is admissible for the purpose of showing the manner in which they were hoisted and lowered. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

See Criminal Law; Trial, 4.

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EXECUTION.

See Exemptions.

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EXECUTORS AND ADMINISTRATORS.

1. **CONSTITUTIONAL LAW—Right of the State to Provide for the Disposition of Property of Persons Who are Presumed to be Dead.**—A statute authorizing administration on the estate of a person supposed to be dead, and providing that no distribution shall be made of his property until security is given, approved by the court, for refunding, with interest, in case he shall be in fact alive, and in case of the inability to give such security, the money shall be invested under the control of the court, is not invalid as authorizing the taking of property without due process of law, though there is no personal service on the absentee. (Pa. St.) Cunnius v. Reading School District, 790.

2. **CONSTITUTIONAL LAW—Statutes Providing for the Administration of the Estates of Persons Who are Presumed to be Dead.**—A state may authorize its courts to grant letters of administration on the estate of a person supposed to be dead on account of his absence for seven or more years, and to declare that such letters, until revoked, and all acts done in pursuance of them or in reliance thereupon shall be as valid as if the supposed decedent were really dead. (Pa. St.) Cunnius v. Reading School District, 790.

3. **FOREIGN ADMINISTRATORS.**—Where an administrator has been appointed and has properly qualified in the state of the domicile of the intestate, he is vested with power to receive payment of debts and to take possession of assets and give proper acquittances therefor wherever the debtors or the holders of the assets may be, within or without the state; but where the debtor or the holder of the assets is in a foreign jurisdiction, and the debts are not paid or the assets surrendered to the administrator of the domicile, the courts of the foreign jurisdiction will not enforce a recovery of such debts or assets until an administrator has procured ancillary letters or a new administrator has been appointed under the laws of the state where the debts exist or the assets are. (N. Y.) Maas v. German Savings Bank, 689.

4. **FOREIGN ADMINISTRATORS.—A Voluntary Payment to a Foreign Administrator is Valid** although an administrator has been appointed in the state, it not being the domicile of the intestate, and the person paying having no actual notice of such appointment. (N. Y.) Maas v. German Savings Bank, 689.

5. **NOTICE, Constructive, of the Appointment of an Administrator.**—The fact that the appointment of an administrator is made of record in the surrogate's office does not operate as constructive notice of such appointment, so as to invalidate a payment subsequently made to an administrator appointed in the state of the domicile of the decedent. (N. Y.) Maas v. German Savings Bank, 689.

6. **EXECUTORS AND ADMINISTRATORS—Deposit of Trust Funds in Bank.**—An executor has a right to deposit the trust fund of the estate to the account thereof in a solvent bank. (Iowa) Officer v. Officer, 365.

7. **EXECUTORS AND ADMINISTRATORS—Liability for Trust Funds Deposited in Bank.**—An executor who deposits the trust fund of the estate to the account thereof in a solvent bank is not liable for any loss occurring through the failure of such bank. (Iowa) Officer v. Officer, 365.

8. **EXECUTORS AND ADMINISTRATORS—General Deposit in Bank.**—If an executor deposits the trust fund of the estate in a bank to the account of such estate, and subject to check, without any promise on the part of the bank to keep the identical money and to return it to the executor, such deposit is a general, and not a special deposit. (Iowa) Officer v. Officer, 365.

9. **EXECUTORS AND ADMINISTRATORS—General Deposit of Trust Fund in Bank—Preference as to Creditors.**—If an executor makes a general deposit of the trust fund of the estate to the account thereof in a bank, neither he nor the cestui que trust is in case of the failure of the bank, entitled to any preference over other creditors in respect to such deposit. (Iowa) Officer v. Officer, 365.

10. **EXECUTORS DE SON TORT.**—What facts constitute one an executor de son tort is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury. (Ill.) Rohn v. Rohn, 185.

11. **EXECUTORS DE SON TORT.**—One who takes charge of an estate at the request of the intestate, who does not desire administration, thereon, must hold and account therefor to the widow and minor heirs in the proportion fixed by statute, and an attempt to carry out the instructions of the intestate for a different disposition of the estate makes him an executor de son tort. (Ill.) Rohn v. Rohn, 185.

12. **EXECUTORS DE SON TORT—Duties of.**—One who attempts to take charge of and distribute an intestate estate without administration must exercise the same diligence in the collection of debts due the estate as though he were a regularly appointed administrator. (Ill.) Rohn v. Rohn, 185.

13. **EXECUTORS DE SON TORT.—Acts of Kindness or Charity** not creating liability as an executor de son tort are limited to such acts as directing a funeral, paying funeral expenses, preserving of the estate from loss or waste, and the like. (Ill.) Rohn v. Rohn, 185.

14. **EXECUTORS DE SON TORT—Estoppel—Setoff.**—In an action at law by a widow to enforce a liability of a person as executor de son tort of her husband's estate, the questions whether she is estopped to recover or whether the amount claimed should be taken from her share of the estate cannot be litigated, as they must be determined in a court of equity. (Ill.) Rohn v. Rohn, 185.

15. **EXECUTOR'S SALE, When Cause Transferred to Circuit Court.**—When the court of common pleas of Missouri, the judge thereof being disqualified, certifies a case to the circuit court, that court has jurisdiction to order an executor's sale, although the record does not show the steps leading up to the transfer of the case. (Mo.) Meddis v. Kenney, 496.

16. **EXECUTOR'S SALE—Notice, Raising Question of an Appeal.** If the point is not made in the trial court that an executor's deed shows on its face that the notice of sale was not published for the requisite time, the question cannot be raised on appeal. (Mo.) Meddis v. Kenney, 496.

17. **EXECUTOR'S SALE—Estoppel by Accepting Proceeds of.**—A son who, on an executor's sale of his father's estate, accepts his distributive share, knowing it to be such, is estopped to question the sale and the conveyance made by virtue of it. (Mo.) Meddis v. Kenney, 496.

18. **EXECUTORS, Power of Sale Given to Should not be Authorized to be Exercised by Referee.**—In a suit to compel an executor to exercise a power of sale contained in a will to raise money to pay the debts of his testator, the court should not direct the sale to be made by the referee. Unless the executor is found to be unfit or incapacitated to execute the power, the judgment should direct him to execute the sale. (N. Y.) Holly v. Gibbons, 694.

19. **ESTATES OF DECEDENTS—Creditors' Right to Payment Out of Real Property of by Loss of Lien.**—Where the indebtedness of a decedent ceases to be secured by a lien on his real estate because two years have elapsed without the holder of the indebtedness bringing suit thereon, they are not entitled to the sale of realty under a power given in the will to payment from the proceeds. (Pa. St.) In re Cooper's Estate, 799.

20. **EQUITY, Jurisdiction of, to Compel Executors to Exercise the Power Contained in a Will.**—A court of equity has jurisdiction to compel the exercise by an executor of a power of sale contained in a will for the purpose of satisfying a debt due from the testator. (N. Y.) Holly v. Gibbons, 694.

21. **LIMITATIONS, STATUTE OF—Executor's Power to Prevent the Running of.**—There is a distinction between the right or an executor to revive an indebtedness against his testator's estate and his right to acknowledge and keep in force a subsisting obligation by making payments on the principal debt or by way of keeping down the interest. In the one case he creates an indebtedness, while in the other he performs a moral obligation and executes a duty recognized by law. (N. Y.) Holly v. Gibbons, 694.

22. **RES JUDICATA.—A Decree by a Surrogate that a Creditor's Petition be Dismissed** and that the proceeding to compel the executor to account is barred by the statute of limitations, does not estop the creditor from maintaining an action subsequently on his demand, when, by the statute of the state, the fact that a claim is disputed deprives the surrogate of jurisdiction to determine its validity. (N. Y.) Holly v. Gibbons, 694.

23. **PRACTICE—Defect of Parties.**—To a Suit to Compel an Executor to Exercise a Power of Sale Contained in a Will for the purpose of obtaining money with which to pay debts of the testator, his daughter, who is one of his heirs at law and who, as devisee under the will, is entitled to the proceeds of the sale of a specified farm after the payment of all claims against his estate, is a necessary party. (N. Y.) Holly v. Gibbons, 694.

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EXEMPTIONS.

1. **EXEMPTION—Waiver of by Delay or Resort to Other Remedy.**—The exemption of property from attachment is not waived by a motion to dissolve the attachment, nor by mere delay in making a claim, provided it is made within a reasonable time before the sale. (Wash.) State v. Gardner, 858.

2. **EXECUTION—Exemption of Golddust from as Earnings of the Judgment Debtor.**—Golddust mined by a judgment debtor from a mining claim to which he has a possessory title is exempt from execution, under a statute exempting the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of the execution, where the constitution of the state provides that the legislature shall enact liberal homestead and exemption laws. (Mont.) Dayton v. Ewart, 549.

FOREIGN CORPORATIONS.

See Corporations.

FOREIGN LAWS.

See Evidence, 1.

FRAUD.

See Contracts, 3; Deeds; Ejectment.

GAS COMPANIES.

See Constitutional Law, 5.

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GUARDIAN AND WARD.

1. **A CHECK Drawn by I. C., Guardian, Puts the Payee on Inquiry** to ascertain the authority of the guardian to apply the money to the payment of a debt not due from the ward. (N. Y.) Cohnfeld v. Tanenbaum, 653.

2. **BANKING—Account in Name of Guardian—Presumption as to Ownership of Moneys.**—Where an account is opened in the name of I. C., guardian, in which moneys belonging to the ward are intermingled with moneys of a corporation of which the guardian was the manager, any balance remaining on deposit after the drawing of various checks will be presumed to be the money of the ward. (N. Y.) Cohnfeld v. Tanenbaum, 653.

HABEAS CORPUS.

1. **HABEAS CORPUS—Certiorari, when Necessary in Proceedings by.**—If, in a proceeding by habeas corpus, it is necessary to produce the record, upon which the detention is based, this may be accomplished by using certiorari as an ancillary proceeding. (Wis.) State v. Whitcher, 968.

2. **HABEAS CORPUS—Review of Decision Upon.**—A decision in a habeas corpus proceeding now stands in no different position from one in any other proceeding. If it is desired to be reviewed on the merits, a motion should be made in the ordinary way for a review before the circuit court, and if it is desired to present the question whether the decision rendered is right, a writ of error should be prosecuted for that purpose. (Wis.) State v. Whitcher, 968.

3. **CERTIORARI to Review a Decision in Habeas Corpus.**—An error of a court commissioner in remanding a prisoner in habeas corpus proceedings cannot be reviewed on certiorari. (Wis.) State v. Whitcher, 968.

See Certiorari, 2; Martial Law, 10.

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HOMESTEAD.

HOMESTEAD—Widow's Possession not Adverse.—A widow's possession of the homestead is, in its inception, friendly, and not adverse to the heirs of the husband or their assigns, and will be regarded as so continuing until disclaimed by hostile acts or declarations. (Mo.) Meddis v. Kenney, 496.

See Marriage, 8.

HOMICIDE.

1. **MURDER—Assault to Commit—Instructions.**—On a prosecution for sending a box containing explosives for another person to open with intent to commit murder, an instruction to the jury that in order to convict, it is necessary to find that the accused was in fact the person who sent the box is sufficient in the absence of a request for special instructions on that subject. (Iowa) State v. Hoot, 352.

2. **MURDER—Assault to Commit—Essentials of.**—Proof of a specific intent to kill with malice aforethought is essential to the crime of an assault with intent to murder. (Iowa) State v. Hoot, 352.

3. **MURDER—Assault to Commit—Intent.**—If a husband sends a box containing explosives to the home of his wife, but addressed to himself, with the expectation and intent that she shall receive and open it and that her death shall result therefrom, he is guilty of assault with intent to murder, regardless of whether his wife was authorized either by him or otherwise to receive and open such box. (Iowa) State v. Hoot, 352.

4. **MURDER.—The Survivor of an Attempted Double Suicide** is not guilty of murder, unless the evidence shows, beyond a reasonable doubt, that he did or said something which aided, encouraged, or induced, the deceased to kill herself. (Ill.) Burnett v. People, 206.

5. **MURDER—Suicide—Evidence of Chastity.**—The admission of evidence of the general good reputation of the deceased for chastity is prejudicial error against a person accused of inducing her to commit suicide, when such chastity is not in issue, and is not attacked, except by showing a liaison between the deceased and the accused. (Ill.) Burnett v. People, 206.

6. **EVIDENCE.—Dying Declarations Are Open to Contradiction by Inconsistent Statements** previously made by the deceased. (Ind.) Seifert v. State, 340.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE, His Liability for Goods Purchased by Her.**—Though goods purchased by a wife on her husband's credit from a person with whom she has not been accustomed to trade are of the class ordinarily called necessaries, he may show, in his defense, that she was amply supplied with articles of like character, or that she had been furnished with ready money with which to pay cash therefor. The question of her agency to act for him is one of fact and is not a conclusion of law, to be drawn alone from the marital relation. (N. Y.) Wanamaker v. Weaver, 621.

2. **GIFT TO WIFE—Adultery as a Ground for Revocation.**—For a wife to induce her husband to convey property to her after she has been guilty of adultery, or in contemplation of such subsequent adultery, is such fraud as entitles him to revoke the gift on discovering her conduct. (Ga.) Evans v. Evans, 180.

See Marriage.

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Husband and Wife, necessaries, husband's liability for, where wife has means of her own, 644.
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INDICTMENT AND INFORMATION.

1. **CRIMINAL LAW.—An Information may be Amended** both in matters of form and in matters of substance. (Vt.) State v. Barrell, 813.

2. **CRIMINAL LAW—Information, by Whom may be Amended.—** The successor in office to the state's attorney who filed an information may amend it. (Vt.) State v. Barrell, 813.

INFANTS.

1. **CUSTODY OF INFANT—Welfare of the Child.—A Widow** of moral habits, good health, and enough industry reasonably to insure her child from want and distress, is entitled to his custody as against his grandparents, although they possess fortune, character, kindness, and affection for the child, and he desires to remain with them. (Ky.) Stapleton v. Poynter, 411.

2. **CUSTODY OF INFANT.—The Wishes or Judgment of a Child** of sufficient maturity to realize in a measure his situation cannot, independent of or despite other circumstances, control in the determination of his custody. (Ky.) Stapleton v. Poynter, 411.

3. **CUSTODY OF INFANT—Mother's Contract Relinquishing.—** A contract made by a woman under the disability of coverture, and

indorsed by her husband, giving their child to its grandparents, is not binding upon her, and upon her husband's death she may recover the custody of the child. (Ky.) Stapleton v. Poynter, 411.

4. **CUSTODY OF INFANT—Welfare of the Child.**—It is only in cases where a parent asks a court to change the custody of his child, basing his claim upon a legal right, that the court will look to the welfare of the child in withholding its aid, basing its action upon the principle that equity will not do a wrong to aid a mere naked legal right. (Ky.) Stapleton v. Poynter, 411.

See Parent and Child.

INFORMATION.

See Indictment and Information.

INJUNCTION.

See Carriers, 9, 10; Mines and Minerals, 3.

Note.

Injunction, mandamus to compel the allowance or dissolution of, 864, 865.

INSURANCE.

1. **INSURANCE—Waiver of Conditions.**—Although an insurance policy provides that its conditions cannot be waived, except by writing on or attached to the policy, yet such conditions may be waived by the conduct of the company which gives the insured reasonable ground to believe that it does not intend to insist upon the strict compliance with the terms of the policy. (Iowa) Lutz v. Anchor Fire Ins. Co., 349.

2. **INSURANCE—Violation of Conditions—Estoppel.**—If an insurance policy provides that the taking of additional insurance without the written consent of the company shall render the policy void, and the company has notice that this condition in the policy has been violated, it is estopped, by thereafter collecting further premiums from treating the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring. (Iowa) Lutz v. Anchor Fire Ins. Co., 349.

3. **INSURANCE—Conditions—Interest of Insured.**—Under a condition in a fire insurance policy that it shall be void if any change other than by the death of the insured takes place in the "interest, title or possession of the subject of the insurance," the word "interest" has the same meaning as in the legal phrase "right, title and interest," and means a proprietary or insurable interest, and not a mere sentimental interest. Such condition is not broken so long as the insured continues to be the sole owner of the property insured. (La.) Stenzel v. Philadelphia Fire Ins. Co., 481.

4. **INSURANCE—Conditions—Notice of Sale.**—A condition in a fire insurance policy that it shall be void if, with the knowledge of the insured, notice of sale of any of the insured property shall be given by virtue of any mortgage or trust deed, has reference to extrajudicial enforcement of a mortgage by means of notice to the mortgagor, and is inoperative in a state where such mode of enforcing mortgages is not known to its law. (La.) Stenzel v. Philadelphia Fire Ins. Co., 481.

5. **INSURANCE—Conditions—Foreclosure Proceedings.**—A condition in a fire insurance policy that it shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced against the subject of insurance, means the institution of suit or judicial proceedings for the enforcement of the mortgage, and waiver of legal delays, or other waiver of a nature to facilitate and expedite legal proceedings when begun does not of itself constitute the institution of judicial proceedings. (La.) Stenzel v. Philadelphia Fire Ins. Co., 481.

6. **INSURANCE—Liability for Loss—Value of Property Destroyed.**—In determining the amount of liability of an insurer for a total loss under a fire insurance policy, the market value of the property destroyed does not necessarily govern. The insurer is liable for the actual cash value of the property as it stood at the time of the loss, taking into consideration the cost of rebuilding and allowing for the difference in value of the new building and the value of the old building when destroyed. (La.) Stenzel v. Philadelphia Fire Ins. Co., 481.

7. **INSURANCE—Presumption as to the Reading of the Application.**—In the absence of fraud, the legal presumption is that the insured read, or had read to him, the application before signing it. (N. Y.) Russell v. Prudential Ins. Co., 656.

8. **INSURANCE—Application, When Binding on the Insured.**—The insured is charged with notice of the contents of a written application which he executed and which, by the terms of the policy, is made a part thereof; and if the application provides that the policy shall not be in force until the first premium is paid, the legal result is that the insured covenants with the corporation directly, and not through its agents, that the policy shall not be binding until such payment is made. (N. Y.) Russell v. Prudential Ins. Co., 656.

9. **INSURANCE, LIFE—Agent, Authority of May be Limited.**—An insurance corporation may enter into a contract with a person applying for insurance which so fixes the precise conditions under which the policy shall issue that an agent, in the absence of express authority, cannot abrogate it. (N. Y.) Russell v. Prudential Ins. Co., 656.

10. **INSURANCE, LIFE—General and Local Agents—Restrictions on the Power of.**—An insurance corporation may so draw the various papers connected with its contract of insurance as to prevent general and local agents from exercising powers to the detriment of the corporation, when the substantial provisions of that contract are brought home to the insured prior to the alleged delivery of the policy. (N. Y.) Russell v. Prudential Ins. Co., 656.

11. **INSURANCE, LIFE—Provisions Requiring Payment of Premium Before Policy Takes Effect, Agent, When may Waive.**—When an application for life insurance, signed by the applicant, provides that the policy shall not take effect until the first premium is paid in full, and the policy, as issued, declares that no agent has power to extend the time for paying the premium or to waive any forfeitures, and that these powers can be exercised only by the president or secretary or one of the vice-presidents and will not be delegated, and that no provision in the policy can be waived or modified except by such officers by indorsement on the policy, a general agent whose appointment specifies that he has no authority to make, alter or destroy any contract, to waive any forfeiture or to receive any moneys except on policies or renewals signed by the president, secretary or

manager of the ordinary branch, has no power to waive the payment of the first premium, and the delivery of a policy by him without such payment, is ineffective. (N. Y.) Russell v. Prudential Ins. Co., 656.

12. **INSURANCE, LIFE—Right of Beneficiary to Pay Premiums to Keep Alive.**—If a policy of insurance issues on the life of A payable to his wife, but in case of her death, to her surviving children, one of the latter, on the death of the mother, has the right to pay the premiums thereafter accruing, and thus keep the policy alive. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

13. **INSURANCE, LIFE—Premiums Necessary to be Paid by One of Several Beneficiaries.**—Where there are several beneficiaries of a policy insuring a life, one cannot, by paying his share of the premium keep the policy alive, but must pay the entire premium as it accrues, or forfeit all his interest. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

14. **INSURANCE, LIFE—Liability of One of Several Beneficiaries for Premiums Paid by Another.**—If one of several beneficiaries pays all the premiums accruing on a life insurance policy to prevent its forfeiture, he cannot then maintain an action against the others for their share, but whenever any of them asserts a right to share in the proceeds of the policy, he becomes liable to contribute his share of the moneys so paid and accruing for his benefit. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

15. **INSURANCE, LIFE—Lien Upon Proceeds of in Favor in One Paying Premiums.**—When a person, not being the owner of a policy of insurance, nor bound to pay the premium, but having some interest, or color of interest, in it, voluntarily pays the premiums thereon, and thus keeps it alive for the benefit of a third party, he is entitled to a lien on the proceeds of the policy to secure the repayment of the advances. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

16. **PLEADING—Nonpayment, When Need not be Alleged.**—In an action to compel one of several beneficiaries to contribute his share of moneys to pay premiums to keep a policy of insurance alive, the failure to allege nonpayment is not fatal, because the suit is not upon a contract for the payment of money. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

17. **LIMITATIONS, STATUTE OF.—In an Action to Compel Contribution** by one of several beneficiaries under a policy of life insurance for advancements to keep the policy alive, a cause of action does not accrue when the advancements are made, nor at any time prior to the death of the person on whose life the policy issued. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

18. **HUSBAND AND WIFE—Right of Married Woman to Recover for Advances Made by Her Husband at Her Request.**—If a married woman is one of several beneficiaries under a policy of insurance on the life of another, and the premiums necessary to keep the policy from forfeiture are paid by her husband at her instance and request, and for and on her account, and for her benefit and behoof, she may maintain an action against other beneficiaries to compel them, on their claiming the benefit of the policy, to pay their share of such advances. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

19. **EVIDENCE—Burden of Proof of the Reimbursement of the Plaintiff.**—In an action by one beneficiary under a life insurance policy against another to compel contribution for advances made by

plaintiff to keep a policy on the life of their father alive, in which it is claimed that the plaintiff has been reimbursed by the father for the advances so made, the burden of proof is on the defendant. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

20. **ACCIDENT INSURANCE.—Death by Accident is death by** any unexpected event which happens by chance or which does not take place according to the usual course of things. (Wash.) Horsfall v. Pacific Mut. Life Ins. Co., 846.

21. **ACCIDENT INSURANCE—Death by Accident, What is.—** Death due to dilation of the heart, caused by lifting a heavy weight in the usual course of one's employment, is death by accident. (Wash.) Horsfall v. Pacific Mut. Life Ins. Co., 846.

22. **ACCIDENT INSURANCE—What Injuries Deemed to Leave Visible External Marks.**—Where one, by lifting a heavy weight, causes a dilation of his heart, resulting in his subsequent death, the injury is one where there is a visible external mark, if at once he becomes deathly pale and sick, his hands and feet cold, and perspiration stands out on his face and hands, and the next day his color changes from a ruddy to a bluish gray color, and so remains until his death. (Wash.) Horsfall v. Pacific Mut. Life Ins. Co., 846.

23. **ACCIDENT INSURANCE.—Immediate Notice Required by a Policy Insuring Against Death by Accident Ordinarily Means within** a reasonable time, and with due diligence under the circumstances of the particular case, of which the jury are ordinarily the judges. Notice within twelve days after death does not show such unreasonable delay as precludes submitting the question to the jury. (Wash.) Horsfall v. Pacific Mut. Life Ins. Co., 846.

24. **BENEFIT SOCIETIES—Insurance—Suicide.**—It is presumed that the holder of an insurance benefit certificate was sane at the time he committed suicide. (Ill.) Royal Circle v. Achterrath, 224.

25. **INSURANCE, LIFE—Incontestable Clause.**—Stipulations in a life insurance policy or benefit certificate that it shall become incontestable for fraud in procuring it after the lapse of a specified period from the date of its issue, are valid as creating a short statute of limitations in favor of the insured. (Ill.) Royal Circle v. Achterrath, 224.

26. **INSURANCE—Incontestable Clause—Suicide.**—If a life insurance policy or benefit certificate provides that it shall be incontestable after a certain period, except for certain causes, death by suicide not being one of them, the incontestable clause applies in case of the death of the insured by suicide, although the policy contains another clause, providing that death by suicide is not a risk assumed by the insurer. (Ill.) Royal Circle v. Achterrath, 224.

27. **INSURANCE.—Incontestable Clause** in insurance policies or benefit certificates is liberally construed in favor of the insured. (Ill.) Royal Circle v. Achterrath, 224.

28. **BENEFIT SOCIETIES—Suicide—"Loss of Good Standing."** If a by-law of a benefit society makes a certificate of membership incontestable, after two years, if the member continues "in good standing," obeys the rules and by-laws, and pays his dues and assessments, his death by suicide is not a loss of good standing, especially when action by the society is necessary to deprive him thereof. (Ill.) Royal Circle v. Achterrath, 224.

29. **BENEFIT SOCIETIES—Evidence of Good Standing.**—The certificate issued to a member of a benefit society is evidence of his

good standing at the time of its issue, and such good standing is presumed to continue until there is proof that it no longer exists. (Ill.) Royal Circle v. Achterrath, 224.

30. **BENEFIT SOCIETIES—Good Standing—Suicide.**—If loss of good standing on the part of a member of a benefit society must be established by action on the part of the society, such loss of good standing does not include the act of the member in committing suicide. (Ill.) Royal Circle v. Achterrath, 224.

31. **BENEFIT SOCIETIES—Suicide as Avoiding Certificate.**—Suicide is not a crime. Hence suicide by a member of a benefit society does not avoid his insurance under a provision in the constitution of the society rendering his certificate void if the insured dies on account of a violation of any criminal law. (Ill.) Royal Circle v. Achterrath, 224.

32. **BENEFIT SOCIETIES—Certificate as Contract.**—A certificate of membership issued by an insurance benefit society is a contract, and can be changed only by and with the consent of both parties. (La.) Russ v. Supreme Council etc., 469.

33. **BENEFIT SOCIETIES—Reduction of Insurance—Consent of Members.**—If a benefit society arbitrarily reduces the amount of insurance stipulated in a membership to be paid, payment of the assessments on the reduced basis cannot be construed as a consent by the member to the reduction when made under protest and with tender of the full amount due without such reduction. (La.) Russ v. Supreme Council etc., 469.

34. **BENEFIT SOCIETIES—Reduction in Insurance.**—A clause in a membership certificate in an insurance benefit society by which the member agrees to comply with all of the by-laws of the society then existing or thereafter adopted, does not authorize the society to reduce the amount stipulated in the certificate to be paid, without the consent of the member. (La.) Russ v. Supreme Council etc., 469.

35. **BENEFIT SOCIETIES—Suspension of Member—Failure to Pay Dues.**—A mere delinquency of a member of a mutual benefit association in the payment of dues or assessments does not defeat his good standing so long as he has a right to pay and the association forbears to take action. (Iowa) Jelly v. Muscatine City etc. Aid Society, 378.

36. **BENEFIT SOCIETIES—Suspension of Member for Nonpayment of Dues.**—A provision in the constitution of a mutual benefit association that a member failing to pay his assessment within a certain time after notice of delinquency shall be suspended, is not self-executing, but merely declaratory of the right to suspend for nonpayment of an assessment, and membership or good standing is not lost or forfeited so long as the association does not act. (Iowa) Jelly v. Muscatine City etc. Aid Society, 378.

Note.

Insurance Commissioners, mandamus to compel the issuing of licenses or permits by, 877.

INSURRECTION.

See Martial Law.

INTEREST.

JUDGMENTS — Interest, Statutes Reducing — Retroactive Effect of.—An amendment to a section of the Civil Code prescribing the rate of interest payable on judgments applies to judgments previously recovered, and though so construed, is not unconstitutional. (Mont.) Stanford v. Coram, 566.

INTERLOCUTORY DECREE.

See Divorce.

INTERPLEADER.

1. **INTERPLEADER.—The Complainant, to Maintain a Plea of Interpleader, Must have no Interest in Conflict with that of Either Defendant,** but must merely hold a fund or owe a debt or duty which he is willing to pay or discharge in favor of a rival claimant, whichever he may be. (Vt.) Montpelier v. Capital Savings Bank, 834.

2. **INTERPLEADER.—One cannot Compel Others to Interplead** where their relative rights depend on a question of fact to be settled between himself and one of the parties, though he will not be pecuniarily affected by the decision of the question. (Vt.) Montpelier v. Capital Savings Bank, 834.

3. **INTERPLEADER.—One cannot Compel an Interpleader** where he is beset with a claim founded upon his own alleged promise merely because others who are third parties, instead of himself, must ultimately be the losers if the claim is established. (Vt.) Montpelier v. Capital Savings Bank, 834.

4. **INTERPLEADER.—One cannot Compel an Interpleader** where there is a controversy touching the amount of the fund which should be brought into court, as where the fund consists of an unliquidated sum, the amount of which can be determined only by hearsay testimony. (Vt.) Montpelier v. Capital Savings Bank, 834.

INTERSTATE COMMERCE.

See Commerce.

Note.

Interstate Commerce, adulterated foods, legislation of Congress concerning, does not deprive the state of its right to exercise its police power, 609.

cab service, rendered wholly within a state, is not a part of, 620, 621.

coloring, articles, adulteration of, by, sale of, may be prohibited by the states, 607.

foods, power of the states to prevent the sale of adulterated, 607, 608.

INTERVENTION.

See Appeal and Error, 4, 5.

JUDGMENT.

1. **JUDGMENT upon the Merits, What is.**—If it appears that evidence was offered and received in support of the plaintiff's claim,

and, after considering it, that the court adjudged that the evidence was insufficient, and for that reason that the action be dismissed and the defendant recover his costs, this is a judgment on the merits. (Vt.) Wilkins v. Stiles, 804.

2. **REVERSAL OF JUDGMENT—Res Judicata of Decree Based upon.**—If a federal court holds the judgment of a state court, dismissing an action against a bank for taxes for the years 1893 and 1894, to be a bar to the recovery of taxes against it for subsequent years, and enjoins their collection for such years, but the judgment of the state court is thereafter reversed, the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. (Ky.) Board of Council of Frankfort v. Deposit Bank, 444.

3. **JUDICIAL SALE—Effect of Reversal of Judgment.**—The title acquired by the purchaser at a judicial sale, although he is the plaintiff in the action, is not devested by a subsequent reversal of the judgment. (Ky.) Blake v. Wolfe, 434.

See Divorce; Interest.

Note.

Judgments, mandamus to compel the entry of, 894, 895.

JUDICIAL SALE.

See Executors and Administrators; Judgments, 3.

JURISDICTION.

See Courts.

JURY.

1. **JURY.—The Essentials at the Common Law** were, that a jury should be composed of twelve men, that they should be impartial, and that their verdict should be unanimous. (Mo.) Eckrich v. St. Louis Transit Co., 517.

2. **JURY.—There were Two Kinds of Trial Juries** known to the common law: the regular panel for the sitting or term of court, and the special jury. (Mo.) Eckrich v. St. Louis Transit Co., 517.

3. **JURY TRIAL, Right to Inviolate.—The Provisions of the Constitutions** of Missouri of 1820 and 1865 that the right of trial by jury shall remain inviolate, and the provision of the constitution of 1875, that the right as heretofore enjoyed shall remain inviolate, mean the right of trial by jury as it existed at the common law. (Mo.) Eckrich v. St. Louis Transit Co., 517.

3a. **JURY—Adoption of Common Law in Missouri.**—When the act of 1816 was passed, adopting, as part of the law of Missouri, the common law of England and the statutes enacted prior to 4th James I, the common-law juries, regular and special, were adopted and became a part of the system of the law of that state and of the machinery of its courts. (Mo.) Eckrich v. St. Louis Transit Co., 517.

4. **JURY.—There were no Missouri,** as distinguished from common-law, juries prior to the constitution of 1820. (Mo.) Eckrich v. St. Louis Transit Co., 517.

5. **JURY—Denial of Right to, by Imposing Costs of.**—The fact that a statute requires a party who applies for a special jury to

deposit the cost thereof, which places such jury out of the reach of a poor man, does not make the law obnoxious to the equality clause of the federal constitution. (Mo.) Eckrich v. St. Louis Transit Co., 517.

6. **JURY.—The Provision of the Federal Constitution** guaranteeing the preservation of the common-law right to trial by jury is a restriction on the general government only. (Mo.) Eckrich v. St. Louis Transit Co., 517.

7. **SPECIAL JURY—Manner of Selection, When Constitutional.** The fact that the sheriff in the country, and the jury commissioner in large cities, have power to select special juries, and that they are not drawn by lot, as the regular panel is, does not make the law so providing unconstitutional. (Mo.) Eckrich v. St. Louis Transit Co., 517.

8. **SPECIAL JURY.—At the Common Law and in Missouri** since 1835, special juries have been provided for by law, and the sheriff has selected them, except since that date in cities of over one hundred thousand inhabitants, where the jury commissioner selects them. (Mo.) Eckrich v. St. Louis Transit Co., 517.

9. **SPECIAL JURIES.—There is no Substantial Difference** between the character of special juries at the common law and in Missouri. (Mo.) Eckrich v. St. Louis Transit Co., 517.

Note.

Jury Trial, affidavit of defense may be exacted, 543.
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statutes imposing a double penalty in cases of conviction by, 543.

LANDLORD AND TENANT.

See Croppers.

LARCENY.

1. **LARCENY OF PROPERTY in the Custody of an Infant.—** If property is taken and retained by an infant under ten years of age, or other person incapable of committing a crime, the custody is that of the owner, and one taking it from such irresponsible agent with intent to convert it is guilty of larceny, as in case of finding lost goods. (Ga.) Rice v. State, 99.

2. **LARCENY—Procuring Infant to Take Goods from House.**—One may be guilty of larceny from the house if he procures an infant to enter a house to take goods therefrom, and then receives them. (Ga.) Rice v. State, 99.

LICENSES.

1. **CONSTITUTIONAL LAW—Classification Exempting Union Veterans.**—A statute requiring all peddlers to be licensed and exacting license taxes from all but residents of the state who have served in the war for the suppression of rebellion and have been honorably discharged, discriminates in favor of them in a manner which amounts to a denial to other persons of the equal protection of the laws, and thereby violates the fourteenth amendmnt to the constitution of the United States, and is unconstitutional and void. (Vt.) State v. Shedroi, 825.

2. **LICENSE TAXES may be Exacted for the Purpose of Revenue or of Regulation, or for Both Purposes** in the discretion of the legislature, under a constitution authorizing it to impose property and license taxes. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

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LIENS.

See Mechanic's Lien.

LIMITATION OF ACTIONS.

1. **LIMITATIONS, STATUTE OF.—An Action for the Recovery of Interest** on a promissory note secured by a mortgage on realty is barred when the right of action on the principal is, though the mortgagee retains the right to recover possession of the mortgaged premises in ejectment or by foreclosure proceedings. (Vt.) Porter v. Shattuck, 823.

2. **LIMITATIONS, STATUTE OF.—An Indorsement by a Payee** of payment made on a promissory note after it is barred by the statute of limitations is evidence against the maker of the fact of payment. (Vt.) McDowell v. McDowell, 831.

3. **LIMITATIONS, STATUTE OF.—A Payment Need not Have Been Made with Intent that It Should be Applied to the Payment of the Debt** to remove the bar of the statute. It is sufficient if made to the creditor by way of payment without directing its application, for, in that event, he was at liberty to apply it on any claim which was due, whether barred by the statute or not. (Vt.) McDowell v. McDowell, 831.

4. **LIMITATIONS, STATUTE OF.—An Indorsement of a Credit on a Note or Other Cause of Action** is sufficiently supported where it is relied upon to take the case out of the bar of the statute, by evidence showing that it was for timber cut by the creditor on the land of the debtor under circumstances from which the jury may properly infer that the transaction was one of bargain and sale and not of trespass. (Vt.) McDowell v. McDowell, 831.

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MARRIAGE.

1. **MARRIAGE BY PERSON** having a Living Spouse—When Valid—Until Declared Void.—By the Civil Code of California, if a marriage has been contracted by a person previously married, but whose spouse was absent and not known to be living for the space of five successive years, or generally reputed to be dead, and so believed by such person at the time the second marriage was contracted, it is valid until its nullity is declared by a competent judicial tribunal. Its continuing validity is not affected by the fact

that the parties thereto, hearing that the person was not dead, ceased to live together as husband and wife. The first marriage ceased to be binding until one of the three parties procured a decree pronouncing the second void. (Cal.) Estate of Harrington, 51.

2. **HUSBAND AND WIFE—His Duty to Keep Her Informed of His Whereabouts.**—If a husband is absent from his wife, he should keep her informed of his whereabouts, and a second marriage, contracted after he has been absent and not heard from for more than five years, cannot be pronounced void on the ground that she made no endeavor to ascertain his whereabouts. (Cal.) Estate of Harrington, 51.

3. **ESTATES OF DECEDENTS—Homestead cannot be Set Off to Wife Who has Innocently Contracted a Second Marriage.**—If a wife whose husband has been absent and not known to be living for more than five years, and whom she believed to be dead, contracts a second marriage, it, until annulled, is valid and prevents her from having a homestead set aside to her out of the estate of the first husband after his decease, although, upon hearing that he was not dead, she ceased cohabiting with her second husband. (Cal.) Estate of Harrington, 51.

MARTIAL LAW.

1. **THE EFFECT OF MARTIAL LAW** is to put into operation the powers and methods vested in the commanding officer by martial law. As to the preservation of order and security of life and property there is no limit, but the necessities and exigencies of the situation. In this respect there is no difference between a public war and a domestic insurrection. (Pa. St.) Commonwealth v. Shortall, 759.

2. **MARTIAL LAW—Accountability of Military Commander.**—In war, the military commander is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved. (Pa. St.) Commonwealth v. Shortall, 759.

3. **MARTIAL LAW—Military Authorities may Act upon Appearances.**—In determining responsibility for acts, the courts proceed upon principles of law applicable to issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. When the exigency does not admit of delay, and there is reasonable or probable cause for the belief that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a less extreme course might have been pursued with safety. (Pa. St.) Commonwealth v. Shortall, 759.

4. **MARTIAL LAW—Rights of the Military Though There is No Actual War.**—Where the military are in actual service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. (Pa. St.) Commonwealth v. Shortall, 759.

5. **MILITARY LAW—Protection to a Subordinate or Private Soldier.**—A subordinate stands in a different position from his superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. (Pa. St.) Commonwealth v. Shortall, 759.

6. **MARTIAL LAW.—A Private Soldier is Justified in Shooting and Killing** one who disregards an order to halt, three times repeated, where the order of the commanding officer requires such action in such circumstances, and it is clear that the shooting was not influenced by malice. (Pa.) Commonwealth v. Shortall, 759.

7. **MARTIAL LAW Exists, Though in Time of Peace,** whenever the military arm of the government is called into service to suppress disorder and restore the public peace. (Pa. St.) Commonwealth v. Shortall, 759.

8. **MARTIAL LAW, Declaration of, What is.**—An order of the governor of the state declaring that in a specified district turmoil and riot frequently occur and mob law reigns, and that the civil authority is unable to maintain order and has called on him for troops, and directing the major general to place an entire division on duty to protect men who desire work, to arrest all persons engaging in acts of violence or intimidation, and hold them under guard until their release will not endanger the public peace, and to preserve the public peace and good order upon all occasions within the district specified, establishes qualified martial law therein, and puts it in force only for the preservation of the public peace and order, but not for the ascertainment or vindication of private rights or the other ordinary functions of the government. (Pa. St.) Commonwealth v. Shortall, 759.

9. **MARTIAL LAW—Supremacy of the Military Over the Civil Authorities, When and to What Extent Established.**—It is not true that a community must be either in a state of war or of peace, and that there is no intermediate state. When the civil authority, though in existence and operated for some purposes, is yet unable to preserve the public order, and resorts to military aid, this necessarily means a supremacy of actual force; and if the governor intervenes as supreme executive, he or his representative becomes the superior or commanding officer, and the civil authority is subordinate to the military to whatever extent may be necessary in the discretion of the military commander. (Pa. St.) Commonwealth v. Shortall, 759.

10. **HABEAS CORPUS—Discharge of Private Soldier upon.**—Where the shooting and killing of a citizen by a private soldier is in pursuance of orders given, and the circumstances are such that if he were placed on trial for murder, the court would direct his acquittal or set aside his conviction, he will be discharged on habeas corpus before trial. (Pa. St.) Commonwealth v. Shortall, 759.

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MASTER AND SERVANT.

1. **MASTER AND SERVANT—Pleading Want of Notice of Defects in Appliances.**—Though a defect in an appliance is visible to ordinary observation, yet a complaint which avers that the plaintiff had no knowledge of such defect, because the darkness of the place in which he worked gave him no opportunity to inspect the appliance closely or learn its exact condition, and that he had nothing to do with such appliances and was wholly unfamiliar with them, sufficiently discloses and justifies plaintiff's want of knowledge of the defect of which he complained. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

2. **MASTER AND SERVANT—Safe and Suitable Appliances.**—It is the duty of the master to exercise ordinary care in furnishing appliances reasonably safe and suitable for performing the work required of the servant. The duty is a continuing one, and the servant is entitled to rely on the master's having performed it. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

3. **MASTER AND SERVANT—Appliances, Risks of.**—A servant does not assume the increased risks and hazards of the master's negligence in furnishing unsafe and unsuitable appliances, unless the servant knew, or by the exercise of ordinary care could have known of the defective appliance and of the danger attendant on its use. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

4. **EVIDENCE.—Testimony of a Change in an Appliance After an Injury had Resulted from It** is admissible, though not made by the defendant or any party to the action, if its purpose is merely to show that the appliance had been changed before certain witnesses saw it and thus to account for their giving a different description of its condition from other witnesses who saw it only before such change had been made. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

5. **MASTER AND SERVANT—Perils and Defects, When Assumed.—An Employe is Required to Observe and Avoid all Known and Obvious Perils,** even though they arise from defective machinery or appliances, but he is not bound to search for defects or make a critical examination of the appliances provided for his use. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

6. **MASTER AND SERVANT.—A Servant may Rely on the Duty of His Master to Furnish Reasonably Safe and Proper Appliances and to Properly Inspect Them** having been properly performed, unless defects are such as to be obvious to the servant while giving proper attention to the duties of his employment. (Ind.) Brazil Block Ccal Co. v. Gibson, 281.

7. **MASTER AND SERVANT—Defects—Question for the Jury.** Whether an alleged defect by which an employé was injured was obvious, or whether he knew of it, or by the exercise of ordinary care should have known of it and apprehended the risks and hazards on account thereof, are questions for the jury under proper instructions. (Ind.) Brazil Block Coal Co. v. Gibson, 281.

8. **MASTER AND SERVANT—Duty of Mining Corporations to Keep Place Safe for Employes.**—Though a mining corporation lets work in a mine to contractors, it must keep itself advised, as the work progresses, to see that the mine is not left unsafe for future employés to work in, and if mining blasts are left by which such an employé is

subsequently injured without his negligence, his employer is answerable. (Wash.) McMillan v. North Star Mining Co., 908.

9. **MASTER AND SERVANT—Mining Corporations, Liability of to Employes for Negligence of Independent Contractor.**—If a mining corporation employs a contractor and turns over the work of the mine to him, knowing or chargeable with notice that by his lack of skillfulness or want of diligence or due care hidden dangers may be created whereby its subsequent employés may be injured, then it is answerable to such an employé for any injuries suffered by him through such danger without his negligence. Such contractor must be held to stand in the place of the mine owner, since he delegates to the contractor, for the time being, authority to conduct the operations of the mine. (Wash.) McMillan v. North Star Mining Co., 908.

10. **MINING—Master and Servant—Risks of Employment.**—Danger from an Unexploded Blast is not necessarily incident to his employment, the risk of which the miner assumes, where he is guilty of no contributory negligence. (Wash.) McMillan v. North Star Mining Co., 908.

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MECHANIC'S LIEN.

1. **MECHANIC'S LIEN—Owner of Land.**—A mechanic's lien must have for its foundation a contract made by the owner of the land, not necessarily the absolute owner in fee, but the owner of the estate to be charged with the lien. (Mo.) Wilson v. Lubke, 503.

2. **MECHANIC'S LIEN.**—If an Intending Purchaser makes a contract for the erection of buildings on the land, and work thereunder is begun before the sale is consummated, and a deed of trust executed back to the vendor, as between the purchaser at the foreclosure sale under the trust deed and the purchaser at the execution sale under the mechanic's lien, the former takes the superior title to the land, and the latter the superior title to the buildings. (Mo.) Wilson v. Lubke, 503.

3. **MECHANIC'S LIEN—Justice's Finding as Res Judicata.**—If a mechanic's lien is enforced in a justice's court, a finding, which is not essential to establishing the lien, that the defendant owned the land at a certain date, does not preclude one claiming under a trust deed of the land from showing in the circuit court that the defendant was not the owner at that time. (Mo.) Wilson v. Lubke, 503.

4. **MECHANIC'S LIEN—Employe, Who is Not.**—One is not entitled to a lien as an employé unless he is obligated to deliver his personal services. (Wis.) Farmer v. St. Croix Power Co., 914.

5. **MECHANIC'S LIEN.—A Subcontractor of a Subcontractor** is not entitled to a lien under a statute giving a lien to the contractor, subcontractor, or employé of either who performs any work or labor in or about the erection of a structure or other improvement. (Wis.) Farmer v. St. Croix Power Co., 914.

6. **MECHANIC'S LIEN Employe, Who is not Within the Meaning of the Statute.**—Under a statute giving a lien to a contractor, subcontractor, or employé of either, one who contracts with a subcontractor to haul material, in the execution of which contract he uses twenty or thirty horses and a number of employés, is not entitled to a lien as an employé, though in doing the work, he and his employés act under the direction of the managing agent of the subcontractor. (Wis.) Farmer v. St. Croix Power Co., 914.

7. **MECHANIC'S LIEN—Contractors and Subcontractors, Who are.**—The principal contractor is one standing in direct relation to the proprietor and responsible to him, permitted by the nature of his contract, ordinarily to work out the plan thereof by subletting to others if he sees fit. A subcontractor is a person whose relation to the principal contractor is substantially the same as to a part of the work as the latter's relation to the proprietor. He takes some distinct part of the work in such a way that he does not contemplate doing merely personal services. (Wis.) Farmer v. St. Croix Power Co., 914.

MEDICAL ATTENDANCE.

See Criminal Law, 10-15; Physicians and Surgeons.

Note.
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MILITIA.

See Martial Law.

MINES AND MINERALS.

1. **MINING CLAIMS.**—The location of a mining claim can rest only upon actual discovery of a vein or lode, and notice of location posted before such discovery is a nullity. (Mont.) Gemmell v. Swain, 570.

2. **MINING CLAIMS—Possession of, When Restricted to Actual Occupancy.**—One who enters upon vacant, uninclosed mineral land of the United States, prospecting for veins of mineral-bearing rock, acquires no possession or right of possession except of the ground and shafts where he prosecutes his work, and his possession cannot be enlarged so as to include an entire twenty-acre tract, or the whole amount of ground which may be claimed under one or more quartz locations. Until he makes a discovery, he has no right of possession of any definite portion of mineral lands. (Mont.) Gemmell v. Swain, 570.

3. **MINING CLAIMS—Injunctions as Between Prospectors.**—Competing prospectors cannot make use of writs of injunction to secure priority of discovery or location, and one who enters upon a portion of a twenty-acre tract and sinks shafts and prospects for mineral-bearing rock is not entitled to an injunction to prevent another from entering upon another part of such tract and prospecting on the parts thereof not in the actual possession of the plaintiff. (Mont.) Gemmell v. Swain, 570.

4. **OIL LANDS.—A Location of Oil Lands is Invalid** if the locator had at the time made no discovery of mineral on the land. (Cal.) Miller v. Chrisman, 63.

5. **OIL LANDS.—An Invalid Location of Oil Lands** leaves them open to notorious, peaceable, and bona fide entry by others for the purpose of initiating a new location. (Cal.) Miller v. Chrisman, 63.

6. **OIL LANDS.—The Location of Oil Lands is Governed** by the mineral laws of the United States, applicable to the location of placer mining claims. (Cal.) Miller v. Chrisman, 63.

7. **OIL LANDS.—To the Location of Oil Lands, Two Requirements are Essential:** There must be a distinct marking of the location so that boundaries can be readily traced, and the discovery of mineral must be made within the limits of the land located. (Cal.) Miller v. Chrisman, 63.

8. **OIL LANDS—Discovery, When not Sufficient to Support Location.**—One who walks over and posts a notice of location upon lands showing indication of petroleum, such as a spring in which oil comes up and floats over the water in the summer-time when it is hot, and whence the water with a little oil drips over a rock, has not made a discovery sufficient to support a location. (Cal.) Miller v. Chrisman, 63.

9. **OIL LANDS—Second Location, Abandonment of First, When not Necessary to.**—If a location of an oil claim is not valid, its abandonment is not necessary to the making of a subsequent location. (Cal.) Miller v. Chrisman, 63.

10. **OIL LANDS—Location Previous to Discovery.**—It is not necessary that a discovery precede or coexist with the posting of notices and the making of the claim. A discovery subsequently made perfects the title, except in so far as the rights of others may have been intervened. (Cal.) Miller v. Chrisman, 63.

11. **OIL LANDS.—A Location Made by an Association of Persons is One Location,** though covering one hundred and sixty acres, and not eight locations covering twenty acres each, and but one discovery and one doing of assessment work are necessary for the whole tract. (Cal.) Miller v. Chrisman, 63.

12. **OIL LANDS—Conveyance Before Discovery.**—Where a location is made by associates they may convey to one of their number before the location is perfected by discovery, and their conveyance does not result in an abandonment of their claim, nor in the destruction of the location, or any part of it. (Cal.) Miller v. Chrisman, 63.

13. **MINING CONTRACT—Authority to Incur Debt—Evidence.**—If one person furnishes another with a definite sum of money to be used by the latter in prospecting for mineral in consideration of a share in whatever may be found, proof of a letter written by him to the prospector authorizing the latter to incur an additional debt, and stating that he would be responsible therefor, is admissible in favor of one who furnishes the prospector with personal supplies on the strength of the letter. In such case proof of the letter is competent evidence to show that the writer thereof held himself out as a partner of the prospector, and, as such, authorized the debt thus incurred. (Wyo.) Hartney v. Gosling, 1005.

14. **MINING CONTRACT—Authority to Incur Debt—Evidence.**—If several persons furnish another with a definite sum of money to be used in prospecting for mineral, in consideration of a share in whatever is discovered, proof of a letter written by one of such persons to the prospector authorizing him to incur an additional debt, and stating that the writer and his associates would be responsible therefor, is not admissible against such associates, without proof that they knew of, authorized or assented to such letter. (Wyo.) Hartney v. Gosling, 1005.

15. **MINING PARTNERSHIPS—Authority to Borrow Money.**—In a purely mining partnership, one partner has no implied power to borrow money on the credit of the firm. (Wyo.) Hartney v. Gosling, 1005.

16. **MINING PARTNERSHIPS.—Parties May be Tenants in Common** of mining property without constituting a mining partnership. (Wyo.) Hartney v. Gosling, 1005.

17. **MINING PARTNERSHIP Exists Only** when the cotenants or co-owners of the property unite and co-operate in operating or working the mine. (Wyo.) Hartney v. Gosling, 1005.

18. **MINING PARTNERSHIPS.—Implied Power of a Partner** in a mining partnership as to third persons does not extend further than to bind his copartners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management and course of the business. (Wyo.) Hartney v. Gosling, 1005.

19. **MINING PARTNERSHIPS may be Created** not only by the express contract of the parties, but also by their acts. (Wyo.) Hartney v. Gosling, 1005.

20. **MINING PARTNERSHIPS—Authority of Partner to Contract Debts.**—If, in consideration of an interest in whatever might be discovered, persons furnish another with a certain sum of money to prospect for mineral; and agree during his absence to give his family a certain sum for their support, but there is no agreement for further advances, such contract does not obligate the parties, as mining partners, to pay an additional debt incurred by the prospector for money and provisions not used in developing or working a mine in which all of the parties co-operate. (Wyo.) Hartney v. Gosling, 1005.

21. **MINING PARTNERSHIPS—Authority of Partner to Contract Debt—Evidence.**—If one has merely agreed to provide, and does provide, a definite sum of money to another to use in prospecting for mineral, in consideration of sharing in whatever is found, he does not, by such act alone, become bound for all expenses incurred by such other for personal supplies after, or even before, the sum originally furnished has been exhausted, and, in such case he is entitled to testify to the want of authority in the prospector to borrow other money or contract debts on the individual liability of the witness. (Wyo.) Hartney v. Gosling, 1005.

See Master and Servant, 8-10.

MISTAKE.

See Equity.

MORTGAGES.

1. **MORTGAGE—What Property may be Encumbered.**—As a rule, anything or any right capable of passing by succession, descent, or absolute sale, is capable of being encumbered by mortgage. (Mo.) Tuttle v. Blow, 488.

2. **MORTGAGE—Conveyance by Mortgagee, Effect of.**—If a deed absolute in form is in fact a mortgage, a conveyance by the mortgagee passes to the grantee all the former's right, title, and interest. (Cal.) Hooper v. Young, 56.

3. **MORTGAGEE IN POSSESSION—Presumption in Favor of.**—If a mortgagee of real property is in possession, his possession will be presumed to be rightful, and, therefore, to have been taken with the consent of the mortgagor after a breach of the condition of the mortgage. (Cal.) Hooper v. Young, 56.

4. **MORTGAGEE IN POSSESSION—Ejectment Against.**—When a mortgagee has taken possession by the consent of the mortgagor after a breach of the condition of the mortgage, he cannot maintain an action to recover possession until the debt is paid. (Cal.) Hooper v. Young, 56.

See Trademark.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS, Power of—Construction of Laws Granting.**—A doubtful claim of power or any doubt or ambiguity in the terms used by the legislature is resolved against the corporation. (Ind.) Lake County Water etc. Co. v. Walsh, 264.

2. **MUNICIPAL CORPORATIONS—Power of to Sell Lands Held for a Public Purpose.**—A statute declaring that any city owning real estate shall have power to sell and convey the same as the city council may deem expedient relates only to real property held for private purposes. (Ind.) Lake County Water etc. Co. v. Walsh, 264.

3. **A MUNICIPAL CORPORATION has no Implied Authority to Dispose of Lands** which have been conveyed to it for a public use. (Ind.) Lake County Water etc. Co. v. Walsh, 264.

4. **MUNICIPAL CORPORATIONS—What Property of is Devoted to a Public Use and Therefore not Subject to Transfer.—Waterworks and an Electric Light Plant** constructed or purchased by a city and maintained by it for the extinction of fires, for domestic purposes, for lighting streets, and for use in the houses of the inhabitants are to be regarded as devoted to a public use, though rentals are charged and paid for the same. (Ind.) Lake County Water etc. Co. v. Walsh, 264.

5. **MUNICIPAL CORPORATION cannot Compromise Claim for Taxes.**—Under a constitutional provision that "the general assembly shall have no power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, of the indebtedness or liability of any corporation or individual to this commonwealth, or to any county or municipality thereof," the general council of a city cannot compromise a claim for taxes at less than the amount due after the assessment has been regularly made and the claim has come into the hands of the collecting officer. (Ky.) Louisville v. Louisville Ry. Co., 387.

6. **MUNICIPAL CORPORATION—Compromise of Taxes.—A City Attorney** has no authority, either before or after suit is brought for taxes, to compromise and take less than is shown to be due from the taxpayer. (Ky.) Louisville v. Louisville Ry. Co., 387.

7. **MUNICIPAL CORPORATION—Judicial and Ministerial Duties.**—Municipal corporations are not liable for failure to exercise, or for errors in exercising, their legislative or judicial powers; but they are liable for neglect to perform, or for improper or unskillful performance of their ministerial duties. (Ga.) Mayor of Dalton v. Wilson, 101.

8. **MUNICIPAL CORPORATION—Liability for Nuisance.—If a Private Individual Maintains** a nuisance upon private property, which does not obstruct the public streets or imperil the safety of travelers thereon, the duty of the city to abate it is judicial and not ministerial, and for a failure to discharge this duty no action for damages against the city will lie. (Ga.) Mayor of Dalton v. Wilson, 101.

9. **A MUNICIPAL CORPORATION is Liable to a Property Owner for the Damages Resulting from Grading a Street** in front of his lot, if the constitution of the state provides that private property shall not be taken or damaged for a public use without just compensation. (Mont.) Less v. City of Butte, 545.

10. **PUBLIC STREETS—Damages for Grading to the First Grade Established.**—Under a constitution providing that private property shall not be taken or damaged for a public use without compensation being first made to, or paid into court for, the owner, a recovery may be had for injuries received from the grading of a public street to the first and only grade established thereon. The constitution does not distinguish between the first and subsequently established grades. (Mont.) Less v. City of Butte, 545.

11. **MUNICIPAL CORPORATION—Territorial Limit of Power.**—As a rule, a municipal corporation cannot purchase and hold real estate, or lawfully perform any acts, beyond its territorial limits, unless the power so to do is expressly given by the legislature. (Ga.) Langley v. Augusta, 133.

12. **MUNICIPAL CORPORATION—Sewerage Beyond City Limits.**—A municipal corporation may acquire land, and make contracts to construct works, beyond its corporate limits, for the discharge of sewage and drainage, when necessary or manifestly desirable. (Ga.) Langley v. Augusta, 133.

13. **MUNICIPAL CORPORATION—Sewer Irregularly Constructed.**—If a municipal corporation has authority to construct a drain and sewer beyond its corporate limits, an irregular exercise of such authority will not prevent liability from attaching for injuries occasioned to an individual by the drain or sewer. (Ga.) Langley v. Augusta, 133.

14. **MUNICIPAL CORPORATION—Sewer, Negligence in Respect to.**—If a municipal corporation negligently constructs a system of sewerage or drainage, or negligently maintains one properly constructed, so as to injure private citizens or their property, it is liable for the injury occasioned. (Ga.) Langley v. Augusta, 133.

15. **MUNICIPAL CORPORATION—Sewer, Negligence as to—Measure of Damages.**—If the nuisance caused by the negligent construction or maintenance of a system of sewerage is not of a permanent character, but such as the city may at will abate, and when abated the injury occasioned by it will cease, the plaintiff can recover merely the damages sustained within the period of limitations; but if the nuisance is of a permanent and continuing character, he may recover in one action all damages, both past and future, resulting therefrom. (Ga.) Langley v. Augusta, 133.

16. **MUNICIPAL CORPORATION—Sewer, Damages When Properly Constructed.**—In the case of a permanent injury to the freehold, resulting from the proper construction and maintenance of a work of public improvement, the measure of damages is the difference in market value before and after the injury. (Ga.) Langley v. Augusta, 133.

17. **MUNICIPAL CORPORATION—Drain, Negligence as to—Elements of Damage.**—If a city constructs or maintains a ditch or drain so as to make a nuisance, a private owner of property may recover for the caving in of his land, the loss in rental value, the expense of building bridges, and damages sustained from sickness. (Ga.) Langley v. Augusta, 133.

18. **MUNICIPAL CORPORATION—Sewers—Defective Plan.**—If a plan for the construction of sewers is palpably bad, it will not excuse the city from resulting damage to private property to show that the execution of the plan was skillful. (Ky.) Louisville v. Norris, 437.

19. **MUNICIPAL CORPORATION—Sewers, Care in Maintaining.** When a city constructs a sewer, it is its duty to exercise ordinary care and skill to keep it in condition to carry off the water collected thereby from such rainfalls as may reasonably be expected to occur in the neighborhood drained. (Ky.) Louisville v. Norris, 437.

20. **MUNICIPAL CORPORATION—Sewers, Notice of Defective.** If the original construction of a sewer is manifestly deficient for the purposes intended, notice to the city of the defects is not necessary in order to fix its liability for injuries resulting to private property. (Ky.) Louisville v. Norris, 437.

21. **MUNICIPAL CORPORATION—Injury from Sewer.—The Statute of Limitations,** on an action against a city for the negligent construction of a sewer whereby property is flooded, runs only from the date of the flooding. (Ky.) Louisville v. Norris, 437.

22. **MUNICIPAL CORPORATION.—The Location of a Pesthouse** by a city near a farm and the residence thereon is an injury and a taking of the adjacent property for which compensation must be made. (Ky.) City of Paducah v. Allen, 422.

23. **MUNICIPAL CORPORATION—Pesthouse.—The Measure of Damages** for permanently locating a pesthouse adjacent to private premises, in the absence of actual communication of disease, is the depreciation in the market value of the property. (Ky.) City of Paducah v. Allen, 422.

24. **MUNICIPAL CORPORATION—Pesthouse.—Evidence of the Depreciation in Value** of adjacent property from the establishment of a pesthouse should be confined to the testimony of witnesses acquainted with the property, its value, or the value of similar properties in the vicinity and their market values, and with the fact to what extent these market values have been affected by the location of the pesthouse. (Ky.) City of Paducah v. Allen, 422.

25. **MUNICIPAL CORPORATION—Pesthouse.—To Prove that the Market Value** of adjacent premises has not been impaired by the location of a pesthouse, evidence is admissible of what adjoining properties of the same character sold for just before and since the establishment of the pesthouse. (Ky.) City of Paducah v. Allen, 422.

26. **MUNICIPAL CORPORATION—Presentation of Claims Against.**—A statute which requires those having claims against municipal corporations for injuries to present them in writing to the governing authority for adjustment, stating the time, place, and extent of the injury, as near as practicable, and the negligence which caused it, before suing therefor, does not require the notice to be drawn with the technical nicety of a declaration; a substantial compliance with the statute is sufficient. (Ga.) Langley v. Augusta, 133.

27. **MUNICIPAL CORPORATION—Notice of Claim, Petition Need not Follow.**—Where a claim for injury has been made in writing against a city in response to the demands of a statute, the petition, in an action to recover for such injury, need not exactly follow the notice, and an immaterial variance between the two as to the

time, place, or extent of the injury does not amount to a fatal variance. (Ga.) Langley v. Augusta, 133.

28. **MUNICIPAL CORPORATION—Prescriptive Rights in Streets.**—Title to a public street cannot be acquired by prescription; neither can have a right to have obstructions for carrying off surface water remain in an unchanged condition, be so acquired. (Ga.) Langley v. Augusta, 133.

Note.

Municipal Corporations, streets, liability of for establishing or changing grades, 548.

MURDER.

See Homicide.

NEGLIGENCE.

1. **NEGLIGENCE, CONTRIBUTORY—When Does not Constitute a Defense.**—When an act is done willfully and wantonly, contributory negligence on the part of the injured person does not bar his recovery. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

2. **NEGLIGENCE—Knowledge that Person is in Peril—What Sufficient.**—While it is essential to liability for injuring a person placed in peril by his own negligence that the defendant know of the danger, and not sufficient that he would have discovered it but for remissness on his part, yet it is not necessary that he know that the injury is inevitable if he fails to exercise care. It is sufficient that the circumstances of which he or his agent has notice are such as convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

3. **NEGLIGENCE, WANTON, Though There is no Intent to Injure.**—Though one has no intent to injure, yet if there is on his part a reckless indifference or disregard of the natural or probable consequences of doing or omitting to do the act, and he does or fails to do it, conscious from his knowledge of existing circumstances and conditions that his conduct will kill or probably result in injury, he is guilty of wanton negligence. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

4. **NEGLIGENCE.—A Person in Great Peril** where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. The reasonableness of his effort to escape injury after the discovery of the danger is a question for the jury, to be determined in view of all the circumstances disclosed by the evidence. (Cal.) Harrington v. Los Angeles Ry Co., 85.

5. **NEGLIGENCE—Violation of a Municipal Ordinance.**—The riding of a bicycle at a rate of speed prohibited by a municipal ordinance is negligence, and an injury resulting to the rider therefrom must be deemed due to his contributory negligence. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

6. **NEGLIGENCE, CONTRIBUTORY—Duty to Avoid Injuring the Person Guilty of.**—He who last has a clear opportunity to avoid an accident by the exercise of proper care to avoid injuring others must do so. (Cal.). Harrington v. Los Angeles Ry. Co., 85.

7. **NEGLIGENCE, CONTRIBUTORY—Known Danger.**—If a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger. (La.) Potts v. Shreveport Belt Ry. Co., 452.

8. **NEGLIGENCE, CONTRIBUTORY.**—To engage in a Dangerous Occupation is not of itself contributory negligence. (La.) Potts v. Shreveport Belt Ry. Co., 452.

9. **NEGLIGENCE, Contributory—Care Required of Boy.**—While a boy twelve years of age may be guilty of contributory negligence which will bar recovery, yet he cannot be held to the same degree of care, prudence, and circumspection required of an older or full-grown person. (La.) Mitchell v. Illinois Cent. R. R. Co., 472.

See Death; Electricity.

Note.

Negligence of masters, servants do not assume the risks of, 317.
presumption of in the event of an accident, 322.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NONRESIDENTS.

See Process.

NUISANCE.

1. **A PUBLIC NUISANCE Cannot be Suppressed at the Suit of a Private Individual** unless he has sustained some damage or injury which is clearly special to himself, and apart from that which the general public sustains. (Pa. St.) Rhymer v. Fretz, 777.

2. **PUBLIC NUISANCE—Erection and Maintenance of a Building, When cannot be Enjoined at the Suit of a Private Person.**—The erection of a frame building on a public street which jeopardizes the safety of property in the vicinity from fire, and in the neighborhood of which there is an unlawful gathering of persons, whereby plaintiff and his neighbors are deprived of the full enjoyment and use of their property and homes, is a public nuisance. Hence, it will not be enjoined at the suit of a private individual. (Pa. St.) Rhymer v. Fretz, 777.

See Municipal Corporations, 8.

OBSTRUCTING JUSTICE.

See Arrest.

OFFICERS.

1. **OFFICER'S SALARY—Assignment of.**—The future salaries of public officers are not assignable, on the ground of public policy, and an attempted assignment thereof is void. (Ky.) Holt v. Thurman, 399.

2. **EXECUTIONS—Officer's Salary.**—A Creditor cannot Subject to the payment of his debts the salary of a public officer which is to become due for services to be rendered in the future. (Ky.) Holt v. Thurman, 399.

3. **OFFICIAL BONDS.—Exemplary Damages** cannot be recovered in an action upon the bond of a public officer. (Ky.) Johnson v. Williams, 416.

OIL LANDS.

See Mines and Minerals, 4-12.

OSTEOPATHY.

See Physicians and Surgeons.

Note.

Osteopathy, constitutionality of statutes regulating practice of, 751.
definitions of, 742.
discriminations against, 752.
practice of, cases holding that it is the practice of medicine, 748.
practice of, whether is the practice of medicine and surgery, 742-748.
statutes regulating the practice of medicine are not applicable to, 742-751.

PARENT AND CHILD.

1. **PARENT AND CHILD—Presumption as to Services Being Voluntary.**—The presumption that a party rendering services to another expects payment is never rebutted by the mere fact that the parties to the transaction are parent and child. (Vt.) McDowell v. McDowell, 831.

2. **PARENT AND CHILD—Obligation to Support Illegitimate.**—At the common law a father was not under any obligation to support his illegitimate child. (Wash.) State v. Tieman, 854.

See Infants.

Note.

Parent and Child, custody of children, principles controlling the right to, 416.

PAROLE OF PRISONERS.

See Criminal Law, 9.

PARTIES.

See Appeal and Error, 4, 5; Equity, 3.

PARTNERSHIP.

1. **PARTNERSHIP—Individual Liability.**—If several are sued as partners, and part of them only prove to be liable, judgment may, under the statute, be rendered against them, and in favor of the others, whether the action be one in contract or in tort. (Wyo.) Hartney v. Gosling, 1005.

2. **PARTNERSHIP—Individual Liability—Evidence.**—If several persons are charged with liability as members of a partnership, evidence is admiscible to show that one of them alone by his acts or

admissions held himself out as a partner of the one who incurred the debt sued on, and so acting individually authorized such debt. (Wyo.) Hartney v. Gosling, 1005.

3. **PARTNERSHIP—Individual Liability—Evidence—Variance.**—Evidence that one of several persons sued as partners, held himself out as a partner and as such individually authorized the debt sued on is not a fatal variance from a complaint alleging that the defendants incurred such debt by members of a partnership. (Wyo.) Hartney v. Gosling, 1005.

4. **PARTNERSHIP—Action at Law for the Wrongful Dissolution of.**—If one of the partners breaks the covenants of a partnership and thereby wrongfully causes its dissolution, the other may maintain an action of assumpsit against him for the damages resulting. (Pa. St.) McCollum v. Carlucci, 780.

5. **PARTNERSHIP—Causing Wrongful Dissolution, What Acts Amount to.**—If one of the members of a partnership advises its employés to bring suits against it, and to obtain judgments under which its property is sold to the partner doing such wrong, and secures a lease of the property with which the partnership was conducted, and judgment on it for the nonpayment of rent, and operates a rival business close by, he is guilty of producing a wrongful dissolution of the partnership for which his partner is entitled to recover damages in an action at law. (Pa. St.) McCollum v. Carlucci, 780.

6. **DAMAGES, Measure of for Wrongful Dissolution of a Partnership.**—The measure of damages in an action by one partner against the other for the wrongful dissolution of a partnership to operate a stone quarry under a lease, is not the value of the quarry, nor is it the plaintiff's share of the profits, but the value of the articles of partnership to him at the time of the wrongful dissolution. (Pa. St.) McCollum v. Carlucci, 780.

See Mines and Minerals, 15-21.

PASSENGERS.

See Carriers.

PATENTS.

See Public Lands.

PAYMENT.

PAYMENT, Evidence of, What not Admissible to Prove.—The defendant is not entitled, on the issue of payment, to prove that he had moneys on deposit to the knowledge of his creditor. (Vt.) McDowell v. McDowell, 831.

See Limitation of Actions, 2-4.

PERJURY.

1. **PERJURY, SUBORNATION OF DEFINED.**—Whoever shall procure another to commit perjury is guilty of subornation of perjury. (Ga.) Stone v. State, 145.

2. **PERJURY, SUBORNATION OF.**—One Witness is sufficient to establish what a suborner of perjury does, but two witnesses, or

one witness and corroborating circumstances, are necessary to establish the perjury. (Ga.) Stone v. State, 145.

3. **PERJURY, SUBORNATION OF—Evidence.**—On a Trial for the subornation of the mother, what the accused said and did at the house in suborning her daughters is relevant as a part of the general scheme to procure evidence and as showing motive and intent. (Ga.) Stone v. State, 145.

4. **ACCOMPLICE.**—A Suborner of Perjury and the Perjurer are not accomplices. (Ga.) Stone v. State, 145.

5. **ACCOMPLICE, Corroboration of.**—A Suborner of Perjury may be convicted on the uncorroborated testimony of the perjurer. (Ga.) Stone v. State, 145.

PESTHOUSE.

See Municipal Corporations, 22-25.

PHYSICIANS AND SURGEONS.

1. **CONSTITUTIONAL LAW—Practice of Medicine.**—A statute designating who are eligible to "practice medicine or surgery," and providing that the expression shall mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever, excepting only midwives, nurses, and persons who minister to or cure the sick or suffering by prayer, is unconstitutional as an attempt to confer a monopoly on the method of the treatment of disease by doctors of medicine and surgeons. (N. C.) State v. Biggs, 731.

2. **POLICE POWER—Practice of Medicine.**—Persons have a right to use methods of treatment for disease or suffering requiring less skill and learning by the practitioner, than is required to constitute a doctor of medicine or a surgeon, and no legitimate exercise of the police power warrants a deprivation of such right. (N. C.) State v. Biggs, 731.

3. **PHYSICIANS AND SURGEONS—Osteopathy—License.**—One who holds himself out as curing disease by a system of drugless healing without medicine or prescription, but by administering massage, baths and physical culture, a manipulation of the muscles, bones, spine and solar plexus, a kneading of the muscles with the fingers of the hand, and by advising his patients as to diet, and who charges and receives fees therefor and has no license, is not guilty of practicing medicine or surgery without a license. There is nothing in such treatment calling for an exercise of the police power, and such practitioner cannot be punished under a law passed by virtue of the police power prohibiting such treatment by unlicensed persons. (N. C.) State v. Biggs, 738.

See Criminal Law, 10-15; Witnesses, 2, 3.

POLICE POWER.

See Constitutional Law.

POWER OF ATTORNEY.

See Principal and Agent.

POWER OF SALE.

TRUST DEEDS with Power of Sale—Probate Proceedings.—Where a trust deed is given, with a power of sale, to secure the payment of indebtedness, and the grantor subsequently dies, the trustee may proceed to exercise the power of sale conferred by it, and it is not necessary for the holder of the indebtedness to enforce his rights through the regular course of administration or by foreclosure in court. (Mont.) Muth v. Goddard, 553.

PRACTICE.

See Appeal; Trial.

PRINCIPAL AND AGENT.

1. **POWERS OF ATTORNEY—Construction of.**—Where the intention of the parties appears from the language employed in a power of attorney, that intention should prevail, and a strained interpretation should never be given to defeat it. Where third persons are concerned, the words of the power are construed against the donor in case of doubt. (Mont.) Muth v. Goddard, 553.

2. **POWERS OF ATTORNEY—Acting Under, When Regarded as for the Principal's Benefit.**—One acting under a power of attorney is not precluded from executing a writing to secure debts due from a partnership of which the donor of the power is a member, on the ground that the act is not for the principal's use and benefit, if the failure to so act must have resulted in the institution of suits and the levies of attachments on the property of the firm. (Mont.) Muth v. Goddard, 553.

3. **POWERS OF ATTORNEY—Construction of.—Every General Power Implies** every particular power necessary to its exercise or performance. The authority to accomplish a definite end carries with it the power to adopt the usual legal means to accomplish the object. (Mont.) Muth v. Goddard, 553.

4. **TRUST DEEDS—Power of Attorney, When Authorizes the Execution of.**—A power to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, mortgages, hypothecations, and other instruments in writing of whatever kind or nature as may be necessary or proper in the premises, authorizes the execution of a trust deed of the principal's real property to secure the payment of indebtedness, and containing a power of sale. (Mont.) Muth v. Goddard, 553.

PRINCIPAL AND SURETY.

1. **BONDS—Liability of Surety.**—If a bond is incomplete, defective, and not signed by the principal named therein, it cannot be enforced against a surety without proof of his consent to its delivery in its incomplete condition. (Iowa) Novak v. Pitlick, 360.

2. **SURETYSHIP.—Contracts of Suretyship or Guaranty Entered Into for a Compensation are Governed** by the rules applicable to insurance contracts. (Wash.) Cowles v. United States Fidelity etc. Co., 838.

3. **GUARANTY SURETYSHIP—Work, When Deemed Done Under the Original Contract.**—If a contract for the construction of a building is entered into, accompanied by the bond of a guaranty

suretyship company, alterations with the consent of the contractor, though not made upon the written order of the architect as provided for in the contract, do not result in a new contract of suretyship to which the contract is inapplicable. (Wash.) Cowles v. United States Fidelity etc. Co., 838.

4. **GUARANTY SURETYSHIP—Changes in Contract Which do not Relieve Surety.**—If a contract for the construction of a building is entered into, accompanied by the bond of a guaranty insurance company for its faithful performance, and the contract provides that alterations shall not be made except upon the written order of the architect, the fact that alterations are made without such written order will not release the surety, if the contractor consents, and the architect audits and certifies the amount which should be paid for such alterations. (Wash.) Cowles v. United States Fidelity etc. Co., 838.

See Officers, 3.

Note.

Principal and Surety difference between gratuitous contracts of suretyship and those entered into for a consideration, 844.

See Guaranty or Fidelity Insurance.

PROBATE PROCEEDINGS.

See Executors and Administrators.

PROCESS.

1. **PROCESS—Service of on Nonresident While in State.**—The managing officer of a nonresident corporation while in the state for the sole purpose of attending a judicial sale of land to which his corporation is a party is not exempt from service of summons in an action against such corporation. (N. C.) Greenleaf v. People's Bank etc., 709.

2. **PROCESS—Service on Nonresident Attorney While in State.**—A nonresident attorney at law while in the state representing his client in a matter pending in court is not exempt from service of summons. (N. C.) Greenleaf v. People's Bank etc., 709.

See Arrest.

PROHIBITION.

1. **A WRIT OF PROHIBITION is not Available for the Correction of an Erroneous Decision,** unless it operates as an unwarranted assumption of jurisdiction. (Vt.) Wilkins v. Stiles, 804.

2. **PROHIBITION to Prevent Disregard of the Rule of Res Judicata.**—A writ of prohibition does not lie to prevent a court from proceeding upon a judgment on the ground that the court rendering it disregarded evidence which showed that the plaintiff was estopped from maintaining the action by a final judgment against him in another court of competent jurisdiction, though because of the absence of any right of appeal, the defendant has no means of relief from the erroneous judgment against him. (Vt.) Wilkins v. Stiles, 804.

3. **THE WRIT OF PROHIBITION is not a Writ of Right,** but its issuance is a matter of discretion, and it will issue only in cases of extreme necessity. (N. C.) Holly Shelter R. R. Co. v. Newton, 701.

4. **PROHIBITION, WRIT OF—Exercise of Right of Eminent Domain.**—A writ of prohibition will not be granted to prevent the clerk of the superior court from hearing an application for the condemnation of a right of way for a railroad. (N. C.) Holly Shelter R. R. Co. v. Newton, 701.

PUBLIC LANDS.

PUBLIC LANDS—Patents, Presumption in Favor of.—On the production of a patent regular on its face, the presumption arises that it is valid and passed the legal title. It is of itself prima facie evidence that the steps required by law for its issuance had been regularly taken before it was issued. (Cal.) Hooper v. Young, 56.

Note.

Public Lands, patents to, mandamus to compel the issuing of, 873.

Public Office, mandamus to compel the refraining from the exercise of the duties of, 854.

mandamus to try title to, 884, 885.

PUBLIC OFFICERS.

See Officers.

Note.

Public Records, inspection of, mandamus to enforce right of, 875.

Public Schools, mandamus to compel the admission of children to, 878.

mandamus to compel the reinstatement of pupils and teachers in, 879.

QUIETING TITLE.

QUIETING TITLE—Adjusting Equities.—In a suit to quiet title under the Missouri statutes, the court may decree that, as between a purchaser at a sale under a deed of trust and a purchaser at a sale under a mechanic's lien, the former takes the superior title to the land, and the latter the superior title to the buildings, but it cannot charge the amount of the mechanic's lien on the buildings, with the right of the former to pay the same within a certain time, and thus redeem the property, and with the right of the latter, in default of such payment, to remove the buildings within a specified time. (Mo.) Wilson v. Lubke, 503.

QUO WARRANTO.

1. **QUO WARANTO.—Granting Leave to File** an information in quo warranto rests in the sound discretion of the court, and, unless that is abused, the judgment of the court below must stand. (Ill.) People v. People's Gaslight etc. Co., 244.

2. **QUO WARRANTO will not Lie** for the enforcement of mere private rights, and can only be resorted to for the vindication of the public interest. (Ill.) People v. People's Gaslight etc. Co., 244.

3. **CONSTITUTIONAL LAW.—Quo Warranto** will lie to determine whether a statute, under which a corporation is alleged to

usurp power, is constitutional. (Ill.) People v. People's Gaslight etc. Co., 244.

RAILROADS.

1. **RAILROAD—Granting Shipper Exclusive Use of a Switch.**—A contract whereby a railroad company, in consideration for a right of way for part of a switch-track, grants to a coal company the exclusive use of such track for coal purposes, is against public policy and void. (Ky.) Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 447.

2. **RAILROAD—Use of Switch, When cannot be Prohibited.**—If a railroad company, in consideration for a right of way for part of a switch-track, grants a coal company the exclusive use of such track for coal purposes, and the carrier cannot perform the contract because opposed to public policy, the coal company cannot prohibit the use of the part of the track passing through its property, when large investments by other parties are dependent upon the continued use of the switch. (Ky.) Louisville etc. R. R. Co. v. Pittsburg etc. Coal Co., 447.

3. **RAILROADS—Negligence—Unusual Dangers.**—If a railway company is engaged in the performance of an extrahazardous undertaking without using proper precautions to safeguard the public, the case must be distinguished from one where a person is injured by his failure to observe necessary precautions against the ordinary and usual dangers to be anticipated. (La.) Mitchell v. Illinois Cent. R. R. Co., 472.

4. **RAILROADS—Negligence—Duty to Give Warning.**—If a railroad company has stationed a flagman at a public crossing for the purpose of warning persons about to cross its tracks, the public have a right to rely upon a reasonable performance of that duty by such flagman, and, upon his failure to perform it, the railroad company is liable for any injury resulting therefrom. (La.) Mitchell v. Illinois Cent. R. R. Co., 472.

5. **RAILROADS—Negligence—"Flying Switches."**—It is gross negligence on the part of a railroad company or its employés to make a "flying" or "running switch" when it is practicable to avoid it, and the switch can be made in another and safer way. (La.) Mitchell v. Illinois Cent. R. R. Co., 472.

See Carriers; Street Railways.

Note.

Railway Corporations, defects in cars furnished by one for the use of another, 306.

duty to inspect cars belonging to others, 307.

RECEIVERS.

1. **RECEIVERS—Consulting the Parties Respecting Their Selection.**—While the ultimate selection of a receiver rests solely with the court, to be determined by the exercise of its discretion, it is proper for the judge to take counsel with those interested in the trust with respect to the most proper selection. The usual course in the English courts is for the interested parties to nominate suitable persons from whom the master chooses the one whose fitness and qualifications his judgment most approves, and reports his selection to the court. (Ind.) Polk v. Johnson, 274.

2. **RECEIVERS Appointed in Pursuance of a Contract with the Persons Interested.**—The court will closely scrutinize all bargains

made between the parties in interest and the person wishing or willing to serve as receiver. If the bargainee is qualified and the contract free from overreaching and beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms. (Ind.) Polk v. Johnson, 274.

3. RECEIVER—Agreement to Serve as Without Compensation.—One who is interested incidentally in a business which is about to go into the hands of a receiver, and who, professing to be influenced by that interest and his friendship for the parties, seeks the appointment of receiver and promises, if appointed, to serve without compensation, cannot, after the parties and others, moved by such promise, solicit and secure his appointment, repudiate the promise and obtain an allowance from the court for his services. (Ind.) Polk v. Johnson, 274.

4. RECEIVER AND INJUNCTION—Notice to Defendant.—A court may, upon a proper showing, appoint a receiver and issue an injunction without notice to the other side, but only in cases of great emergency, and even then the defendant should be afforded a speedy hearing on a motion to vacate the order. (Mo.) Tuttle v. Blow, 488.

5. RECEIVER FOR MORTGAGED PROPERTY—Grounds for.—Pending a suit to foreclose a mortgage on a trademark and the right to make and sell a proprietary medicine, the court may appoint a receiver and grant an injunction on averments that the property is insufficient to pay the debts for which it is pledged, that the mortgagors dispute the validity of the mortgage and are so using the subject of it as to anticipate and discount its income, and that at least one of them threatens to disclose the secret formula and thus destroy the business. (Mo.) Tuttle v. Blow, 488.

RESISTING ARREST.

See Arrest.

RES JUDICATA.

See Judgments.

REVERSAL OF JUDGMENT.

See Judgment.

SALARY.

See Officers.

SALES.

1. SALES—Delivery of Possession.—Upon a sale of personalty, delivery of possession is sufficient, as against third persons, if it is such, as the situation of the property admits, and if the chattels are so situated, that there can be no immediate delivery, it is sufficient if the vendee, without laches, takes possession in a reasonable time after he has an opportunity to do so. (Wyo.) Kinney v. First National Bank, 972.

2. SALES—Delivery of Possession.—If upon the sale of all of a large band of sheep supposed to contain a certain number, it is

unexpectedly found at the time and place of delivery that a considerable number have strayed, and the remainder are delivered, whereupon the purchaser institutes search for the strays without success, there is sufficient delivery of the missing sheep to consummate their sale as against a judgment creditor of the seller, who upon finding them levies on and sells them under execution. (Wyo.) Kinney v. First Nat. Bank, 972.

3. **SALES—Delivery of Possession—Subsequent Mortgage.**—If after the whole of a lot of personal property is sold and part thereof delivered, the seller mortgages the part not then delivered to a third person, this fact does not, in the absence of fraud, in any way affect the rights of the vendee who never assented to, or had notice of, such mortgage. (Wyo.) Kinney v. First Nat. Bank, 972.

4. **AN EXPRESS WARRANTY in Respect to any Particular Matter** excludes the right to rely upon an implied warranty. (Wis.) Northern Supply Co. v. Wangard, 963.

5. **SALE—Warranty, Implied, When not Waived.—The Implied Warranty Involved in an Executory Sale for Goods is not Waived** by merely receiving them into the possession of the vendee. He may take a reasonable time thereafter to discover departures from the agreed quality, even as to matters evidenced by external appearances and to notify the vendor that the goods will not be accepted as satisfying the contract. (Wis.) Northern Supply Co. v. Wangard, 963.

6. **SALE—Warranty, When Waived by Acceptance.**—If goods are sold under a warranty, and, when delivered, there are defects discoverable by the exercise of ordinary care by a person of ordinary intelligence under the circumstances, and he nevertheless accepts the property, neither objecting then, nor within a reasonable time afterward, nor notifying the vendor that the goods will not be received in satisfaction of the contract, such defects are waived, and the vendee cannot subsequently rescind the contract of sale nor counterclaim for damages if sued for the purchase price, nor sue for breach of the warranty after paying for the property. (Wis.) Northern Supply Co. v. Wangard, 963.

7. **SALE—Breach of Warranty—Scienter Need not be Alleged.**—When there is an express warranty of any particular thing, or a machine for a particular purpose, or against particular damages, it is not necessary, in an action for a breach thereof, to allege a knowledge of the falsity of the representation when made. (Ky.) Tyler v. Moody, 406.

8. **SALE—Breach of Warranty.—The Damages Recoverable** for a breach of warranty include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. (Ky.) Tyler v. Moody, 406.

9. **SALE OF GAS MACHINE—Breach of Warranty—Damages.** If a gas machine is sold under a warranty against its exploding, the buyer's recovery, in case of an explosion, may include damages for his personal injuries. (Ky.) Tyler v. Moody, 406.

SEARCHES AND SEIZURES.

See Criminal Law, 17, 18.

SETOFF AND COUNTERCLAIM.

1. **SETOFF.—Demands Which may be Set Off** against each other under the Georgia Code, need not be connected, nor grow out of the same transaction, nor have arisen in mutual dealings. (Ga.) Nix v. Ellis, 111.

2. **SETOFF.—An Assigned Chose in Action** may be used as a setoff. (Ga.) Nix v. Ellis, 111.

3. **SETOFF.—If the Parties are Mutually Indebted,** there are mutual debts. (Ga.) Nix v. Ellis, 111.

4. **SETOFF.—A Receiver Takes the Estate Subject to all Setoffs,** liens and encumbrances, and in the plight existing at the date to which his title ultimately is referred. (Ga.) Nix v. Ellis, 111.

5. **SETOFF of Assigned Chose.—One Indebted to a Bank** may purchase a claim due by it, and use such claim as a setoff, to the extent of the concurrence of the demands, when sued on the debt which he himself owes. (Ga.) Nix v. Ellis, 111.

6. **SETOFF.—The Right to Purchase Claims to Use as Setoffs** against a corporation continues up to the time of the filing of a petition for the appointment of a receiver, although the purchaser knows of the insolvency of the concern. (Ga.) Nix v. Ellis, 111.

SEWERS AND DRAINS.

See Municipal Corporations, 12-21.

SHERIFFS.

See Arrest.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW—Statutes, Title of.—A Penal Code May be Enacted** under the title "An act relative to crimes and punishments and proceedings in criminal cases," including anything relating to crimes and their punishments and proceedings of a criminal nature, but not provisions of a civil nature, though every law is required to embrace but one object which shall be expressed in its title. (Wash.) State v. Tieman, 854.

2. **CONSTITUTIONAL LAW—Legislation in the Wrong Code.—** A statute adding two new sections to the Civil Code cannot be declared unconstitutional because they relate almost entirely to procedure, especially if the sections so added relate to divorce, and the Civil Code contains all the provisions of the law specially applicable to divorce and divorce cases. (Cal.) Deyoe v. Superior Court, 73.

3. **CONSTITUTIONAL LAW—Title of Statute, Construction of.** A constitutional provision requiring the subject of an act to be expressed in its title must be liberally construed, because the constitution itself does not define the degree of particularity required. (Cal.) Deyoe v. Superior Court, 73.

4. **CONSTITUTIONAL LAW—Title of Statutes, When Sufficiently Expresses Their Object.—The title** "An act to add two new

sections to the Civil Code, relating to actions for divorce," is sufficient to sustain provisions providing that when a party is entitled to a divorce, an interlocutory decree so declaring must first be entered, and that the final decree cannot be entered until one year afterward. (Cal.) Devoe v. Superior Court, 73.

5. **CONSTITUTIONAL LAW—Title of Act.**—The general purpose of a constitutional provision that no act shall embrace more than one subject which shall be expressed in its title is accomplished when such title is comprehensive enough to reasonably include, as falling within that general subject and as subordinate branches thereof, the several objects which the act assumes to affect. (Ill.) People v. People's Gaslight etc. Co., 244.

6. **CONSTITUTIONAL LAW—Title of Act.**—The generality of the subject embraced in the title to an act is no constitutional objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific, and it is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which may be embraced in it. (Ill.) People v. People's Gaslight etc. Co., 244.

7. **CONSTITUTIONAL LAW—Title of Act.**—The generality of the title of an act is no constitutional objection to it, so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. (Ill.) People v. People's Gaslight etc. Co., 244.

8. **CONSTITUTIONAL LAW—Contemporaneous Statutes—Construction.**—If a general and special law are enacted at the same time and the provisions of both relate to the same general subject and can stand together without irreconcilable conflict, the general law does not repeal the special, but both are operative. (La.) State v. Hammond Packing Co., 459.

9. **STATUTES—Repeal of by Implication.**—A general license law relating to insurance corporations, both domestic and foreign, requiring fees to be paid prior to the transaction of any business, which fee is a fixed sum varying in amount only at the will of the corporation as to the amount of premium it asks permission to collect, does not by implication repeal a pre-existing statute authorizing taxes to be imposed on any insurance corporation transacting business within the state upon the excess of premiums received over losses and ordinary expenses incurred. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

See Constitutional Law.

STREET RAILWAYS.

1. **STREET RAILWAYS—When Have no Right to Rely on the Presumption that Persons will Care for Themselves.**—The motorman of an electric car, who knows that bicycle racers are traveling at the rate of twenty miles per hour along a narrow path lined with spectators on both sides, and only eighty-five feet away from a place on that path which his car is about to cross, is chargeable with the knowledge that they are all in a position of great peril, and hence has no right to assume that they will be able to care for themselves by taking the necessary precautions to observe the approach of a car, to escape injury from it. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

2. **NEGLIGENCE, GROSS—Instruction to Jury, When not Proper.**—An instruction that if a person injured in colliding with a street-car while riding a bicycle race, was riding at a rate of speed exceeding that permitted by a municipal ordinance, and did not look for an approaching car until it was too late to bring his bicycle to a standstill, so as to avoid a collision, and did not at any time attempt to reduce the speed of the bicycle before the collision occurred, he was guilty of gross negligence, is properly refused. It is for the jury to say, taking all the circumstances into consideration, whether the failure of the rider to look for an approaching car or to attempt to reduce his speed was gross negligence. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

3. **NEGLIGENCE—Liability for Injuring Person Guilty of.**—If a motorman of a street railway company, knowing that a bicycle rider is guilty of negligence in riding at a high rate of speed contrary to the provisions of a municipal ordinance, and that it is doubtful whether such rider may remove himself from his peril, and also knowing that by the stopping of the car the danger to the rider would be removed, nevertheless causes it to be propelled forward to the path over which the rider was approaching, whereby he is injured and killed, the company is answerable in damages. (Cal.) Harrington v. Los Angeles Ry. Co., 85.

SUBSTITUTION OF PARTIES.

See Appeal and Error, 4, 5.

SUICIDE.

See Homicide, 4, 5.

SURETYSHIP.

See Principal and Surety.

SUMMONS.

See Process.

TAXATION.

1. **TAXATION—Choses of Foreign Corporation, Situs of.**—Notes, accounts and other choses in the hands of an agent of a foreign corporation doing business in a city, which have been received in the course of such business, are taxable by the city, it having statutory authority to tax property of every character within its limits. (Ga.) Armour Packing Co. v. City Council of Augusta, 128.

2. **TAXATION OF CARS in Transit—Interstate Commerce.**—Cars of a foreign corporation, other than a railroad company, which are in transit through the state, are instruments of interstate commerce and not taxable in such state. (Ill.) In re Appeal of Union Tank Line Co., 221.

3. **TAXATION OF CARS in Transit.**—Cars of a foreign corporation, other than a railroad company, to whose domicile they are returned when not in use, are, while in transit through another state, not subject to taxation therein. (Ill.) In re Appeal of Union Tank Line Co., 221.

4. **TAXATION.—Credits of a Foreign Corporation payable at its** home office where they are subject to taxation, cannot be taxed in another state. (Ill.) In re Appeal of Union Tank Line Co., 221.

5. **TAXES AND LICENSE FEES—When Both will be Exacted.**—Under a statute providing that the necessary revenue for the support of the state shall be provided by the legislature, which shall levy a uniform rate of assessment and taxation, and that the legislature may also impose license taxes both upon persons and corporations doing business within the state, both property and license taxes may be levied, and the exaction of the one tax is no bar to the imposition of the other. (Mont.) Northwestern Mutual Life Ins. Co. v. Lewis etc. County, 572.

6. **CONSTITUTIONAL LAW—Due Process of Law.**—A statute providing that if the owner of land, his heirs or assigns, shall fail to pay all arrearages of taxes levied thereon, or which ought to have been levied before a certain date, such land shall be forfeited to and vest in the state without judicial proceeding, is unconstitutional and void as depriving the owner of his property without due process of law. (N. C.) Parish v. East Coast Cedar Co., 718.

See Corporations, 6-16; License; Municipal Corporation, 5-6.

Note.

Tax Collectors, mandamus to compel performance of official duties of, 871.

Tenants in Common, cropper's contract, whether created by, 959-962.

TITLE OF STATUTE.

See Statutes.

TRADEMARK.

MORTGAGE.—A Trademark connected with the right to make and sell the thing which it indicates is susceptible of being transferred by mortgage. (Mo.) Tuttle v. Blow, 488.

See Constitutional Law, 9-11.

Note.

Treasurers, mandamus to compel performance of official duties of, 871, 872.

TRESPASS.

1. **IN TRESPASS Continuing Damages may be Computed and Given** after the commencement of the suit if they proceed from the act therein complained of as the cause of action. (Wyo.) Cosgriff Bros. v. Miller, 977.

2. **TRESPASS—Exemplary Damages.**—A claim of right, asserted in good faith, under a mistaken notion of the law, is not sufficient to absolve a trespasser from liability for exemplary damages in a case otherwise warranting their infliction. (Wyo.) Cosgriff Bros. v. Miller, 977.

See Animals.

TRIAL.

1. **PRACTICE.—Failure to Make Findings and Conclusions as** directed by the statute does not constitute reversible error. (Wis.) Farmer v. St. Croix Power Co., 914.

2. **PRACTICE—Decision upon Issues of Fact.**—In a trial in equity the parties are entitled to a decision by the court upon each material issue raised by the pleadings and to such decision also in detail, at least in a reasonable degree, covering all matters not only deemed by the court material to sustain final judgment, but to those matters as to which there is a reasonable controversy respecting whether they have a material bearing on the rights of the parties or not. (Wis.) Farmer v. St. Croix Power Co., 914.

3. **PRACTICE—Decision on Issues of Law.**—The parties in a trial in equity are entitled to the decision of the trial judge specifically upon the various questions of law applicable to the facts found upon which the ultimate conclusions of law must rest. (Wis.) Farmer v. St. Croix Power Co., 914.

4. **PRACTICE—Right to Examine Papers Offered for Identification.**—If writings are shown to a witness and identified as being in the handwriting of a party to the action, and marked for identification, such party has no right to examine such writings unless they are offered in evidence. (Cal.) Stockwell v. Mutual Life Ins. Co., 25.

See Jury.

TROVER AND CONVERSION.

See Carriers, 8.

TRUST DEEDS.

See Power of Sale.

TRUSTS.

TRUST FUND—Right to Follow.—To Recover a trust fund which has been misapplied by the trustee, it must be clearly identified or distinctly traced into the property, fund, or chose which is to be made subject to replace it; when it has been dissipated and can be traced no further than into the hands of the trustee, it is lost, and he who was its owner stands upon no better footing than a general creditor, when the assets of the trustee are being distributed by a court of equity. (Ga.) Ober & Sons Co. v. Cochran, 118.

VESTED RIGHTS.

See Constitutional Law, 21, 22.

VETERANS.

See Licenses, 1.

WAGES.

See Constitutional Law, 15-19.

WARRANTY.

See Sales, 4-9.

WATERS AND WATERCOURSES.

1. **WATERS.—The Common-law Rules as to the Use and Disposition of Water** remain in force in Wisconsin. (Wis.) Huber v. Merkel, 933.

2. **WATERS, Subterranean.—If Waters Simply Percolate Through the Ground** without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume or cut them off with impunity. If, on the other hand, the subterranean waters flow in a definite channel, the rules which govern surface streams apply. (Wis.) Huber v. Merkel, 933.

3. **WATERS, Subterranean, Presumption of Character.—Subterranean Waters are Presumed to be Percolating** until they are shown to be supplied by a definite flowing stream. (Wis.) Huber v. Merkel, 933.

4. **WATERS, Subterranean, When Deemed Percolating.**—If there is a well-defined area of land within which artesian wells may be successfully drilled and flowing water reached in a stratum of lime or sandstone, but in which, when water is struck, the drill rests upon the bottom of the well and does not make any sudden drop, these facts do not justify the conclusion that there is any definite subterranean stream. On the contrary, the conclusion is irresistible that the waters are percolating. (Wis.) Huber v. Merkel, 933.

5. **WATERS, Percolating—Right of Land Owner to Use or Waste.** The owner of land has the right to sink a well and to use the water therefrom as he chooses, or allow it to flow away, regardless of the effect of such use upon his neighbors' wells, and such right is not affected by a malicious intent. (Wis.) Huber v. Merkel, 933.

6. **CONSTITUTIONAL LAW—Water Rights, Legislative Interference with.**—The right of a land owner to sink wells and gather and use percolating waters, even though the flow of his neighbors' wells is diminished, is a property right which cannot be taken away or impaired by the legislature, unless by way of the exercise of the right of eminent domain or by the police power. (Wis.) Huber v. Merkel, 933.

7. **CONSTITUTIONAL LAW.—Statutes Requiring the Preventing of the Wasting of the Waters of Artesian Wells,** as by prohibiting the needless discharge of a greater quantity of water than is reasonably necessary for the use of the owner so as not to diminish the flow of water of other artesian wells in the same vicinity, cannot be sustained as an exercise of the police power. (Wis.) Huber v. Merkel, 933.

WILLS.

1. **WILLS—Revocation by Attempted Alteration.**—If a testator attempts to alter his will by interlining certain words and clauses and drawing lines through others, but not in such a manner that the alterations become effective as parts of his will, they do not amount to its revocation by cancellation. (Vt.) In re Knapen's Will, 808.

2. **WILLS, Alteration of, Attempted, When Ineffective.**—Interlineations in a will and new and independent bequests, all in the testator's handwriting, but without a new execution or attestation in the form required by law for an original will, are ineffective. (Vt.) In re Knapen's Will, 808.

3. **WILLS—Revocation, Partial, When not Accomplished.**—When a testator attempts to alter his will by striking out certain clauses,

making bequests to certain persons, and interlining bequests in favor of others, and there is also a general residuary clause, and the new or interlined bequest is not effective, the will is not revoked as to the bequest so stricken out or erased, because it is fairly inferable that he meant the revocation of it to be dependent on the taking effect of the interlineation. (Vt.) In re Knapen's Will, 808.

See Conversion.

WITNESSES.

1. **WITNESS.—Neither Bad Character nor Conviction of Crime,** such as perjury, renders a witness incompetent; but such matters go to his credibility. (Ga.) Stone v. State, 145.

2. **EVIDENCE—Privileged Communications.—A Request to a Physician to Aid in the Commission of a Crime** cannot be a privileged communication, as where he is requested to produce a criminal abortion. (Ind.) Seifert v. State, 340.

3. **EVIDENCE—Communications to a Physician.**—A statement made to a physician when he calls to collect his bill for services previously rendered cannot be excluded from evidence on the ground that it is a privileged communication, when his advice is not sought nor obtained at that time. (Ind.) Seifert v. State, 340.

4. **CRIMINAL LAW—Construction of Rule Against Compelling One to Bear Witness Against Himself.**—Courts should liberally construe the constitutional provision against compelling an accused to be a witness against himself, and refuse to permit any first or doubtful steps which may invade his rights in any respect. (Wis.) Thornton v. State, 924.

5. **CONSTITUTIONAL LAW—Compelling an Accused to Bear Witness Against Himself.**—It is not the forcing of a prisoner to be a witness against himself to require him to give a witness in or out of court an opportunity to observe such portions of his person or attire as are customarily open to observation. (Wis.) Thornton v. State, 924.

See Evidence; Trial, 4.

Note.
Witness. See Accomplice.

WRIT OF PROHIBITION.

See Prohibition.